TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 214.

CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

HEDWIG E. SVENDSEN.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 24, 1908.

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In the Court of Appeals of the District of Columbia.

CITY AND SUBURBAN RAILWAY OF WASHINGTON, Appellant,
vs.
HEDWIG E. SVEDBORG.
} No. 1210.

a Supreme Court of the District of Columbia.

HEDWIG E. SVEDBORG
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON.
} No. 43965. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Amended Declaration.*

Filed April 8, 1901.

In the Supreme Court of the District of Columbia.

HEDWIG E. SVEDBORG
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON.
} At Law. No. 43965.

Amended declaration, filed with the leave of the court first had and obtained.

The plaintiff sues the defendant, a corporation organized under acts of the Congress of the United States and having its principal office in the District of Columbia, for that heretofore, to wit, on the 16th day of December, A. D. 1899, the said defendant was and now is the owner of a certain street railway operating in and upon the highways of the said District for the carrying of passengers for hire, and on the day and year aforesaid was also the owner of a certain street railway car operated upon the said railway and used for the carriage of such passengers; and the plaintiff says that on the day and year aforesaid she, the plaintiff, was received as such a passenger for hire upon the said railway car whilst it was being operated

upon the said railway, and that it then and there became and was the duty of the defendant to use due and proper care that the plaintiff should be carried thereupon and allowed to alight therefrom at her destination without injury to her, but that the defendant, not regarding its duty in that behalf, did not use such due and proper care, but wholly neglected so to do, and so carelessly, negligently, and improperly conducted the said car that while the plaintiff was in the act of alight-
2 ing therefrom on G street north, at or about its intersection with Eleventh street east, in the said District, the said car having been brought to a stop for her to alight, through the negligence, carelessness, and improper conduct of the defendant, its agents and employees, the said car was suddenly started again before the plaintiff had reached a position of safety upon the ground, by reason of which the plaintiff, though herself exercising ordinary care in that behalf, was thereby violently thrown to the ground, and by reason thereof was greatly bruised and injured about the knee, and the muscles of her body were greatly strained and wrenched and she was greatly bruised and permanently injured about the left hip, and the said hip was permanently fractured and her left leg was permanently shortened, and she became lame and unable to walk without the aid of a crutch and will ever so remain, and since the happening of the said grievance and by reason thereof the plaintiff has undergone great bodily pain and mental suffering, and will ever continue so to do, and has been put to great expense in being nursed and medically and surgically treated for her said injuries, to wit, to the expense of five hundred dollars ($500.00), to the damage of the plaintiff twenty thousand dollars ($20,000.00); whereof the plaintiff claims twenty thousand dollars ($20,000.00), besides costs.

A. A. LIPSCOMB,
CHARLES P. JANNEY,
PHILIP WALKER,
Attorneys for the Plaintiff.

3 *Plea to the Amended Declaration.*

Filed April 25, 1901.

In the Supreme Court of the District of Columbia.

HEDWIG E. SVEDBORG
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON. } At Law. No. 43965.

The defendant, The City and Suburban Railway of Washington, for plea to the amended declaration filed in the above-entitled cause, says that it is not guilty as alleged.

J. J. DARLINGTON,
R. B. BEHREND,
Attorneys for Defendant.

Joinder on Plea to Amended Declaration.

Filed April 29, 1901.

In the Supreme Court of the District of Columbia.

HEDWIG E. SVEDBORG
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON. } Law. No. 43965.

4 The plaintiff joins issue on the defendant's plea to the amended declaration in this cause.

A. A. LIPSCOMB,
CHAS. P. JANNEY,
PHILIP WALKER,
Attorneys for the Plaintiff.

Memoranda.

November 8, 1901.—Verdict for plaintiff for $6,500.00.
November 22, 1900.—Motion for new trial continued until November 29, 1901.
November 29, 1901.—Motion for new trial continued until Dec. 6, 1901.
December 6, 1901.—Motion for new trial argued and submitted.
January 6, 1902.—Motion for new trial to next term of court and October term, 1901, prolonged 38 days to settle bill of exception.

5 Supreme Court of the District of Columbia.

TUESDAY, *January* 21, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

HEDWIG E. SVEDBORG, Plaintiff,
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON, Defendant. } At Law. No. 43965.

After consideration of the motion for a new trial heretofore argued and submitted, it is considered that said motion be, and hereby is, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff recover against the defendant six thousand five hundred dollars ($6,500.00), with interest thereon from this date, for her damages, as aforesaid, assessed, together with her costs of suit, to be taxed by the clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals, and the penalty of the bond on appeal for costs is fixed in the sum of one hundred dollars.

Memoranda.

January 29, 1902.—Appeal bond filed.

February 14, 1902.—Time to settle exceptions continued to
6 February 28, 1902.

February 18, 1902.—Bill of exceptions submitted to court.

March 7, 1902.—Time to file transcript in Court of Appeals extended 30 days.

Supreme Court of the District of Columbia, April 4, 1902.

HEDWIG E. SVEDBORG, Plaintiff,
vs.
CITY AND SUBURBAN RAILWAY, Defendant. } At Law. No. 43965.

Now comes here again the defendant, by its attorneys, and prays the court to sign, seal, and make part of the record its bill of exceptions taken during the trial hereof and submitted to the court on the 18th day of February, 1902, now for then, which is accordingly done.

7 *Bill of Exceptions.*

Filed April 4, 1902.

In the Supreme Court of the District of Columbia.

HEDWIG E. SVEDBORG
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHington. } At Law. No. 43965.

Be it remembered that at the trial of this cause the plaintiff, in order to maintain the issue on her part joined, produced as a witness the plaintiff, HEDWIG E. SVEDBERG, who testified in substance as follows: That she is a widow, fifty years old, living on 11th street northeast; that on the evening of the accident she was on her way home from her country home in Virginia; that she met her daughter, who was fourteen years of age, at the depot; that she and her daughter thereupon took an Avenue car, transferring north on 7th, and alighted at G street; that after making a purchase of a pair of shoes they came back to 7th and G streets and got on a car of the defendant going east; that the car, which was a combination car, the close- part being in front and the open part in the rear, was crowded; that she took a seat in the open part of the car and her daughter in the closed part; that before boarding the car she handed to the motorman thereof her basket, in which were some fresh eggs and other articles brought from the country; that when the car neared her destination, 11th and C streets northeast, there was only one other passenger, a gentleman, in the car besides herself and daughter; that the car stopped

at 11th and C streets—on the west side thereof—and
8 her daughter alighted; that while her daughter was walking up towards the front of the car, to procure the basket from the motorman, she attempted to alight, when the car jerked forward and threw her to the ground; that she got up and fell again; that she does not know who picked her up; that the conductor came to her assistance, and the motorman came running through the car; that she was carried from the scene of the accident to her home by friends; that her family physician, Dr. Keetch, called the same evening, at eleven o'clock, when she was in bed with her clothes on; that he injected morphine to relieve the pain; that Mr. Hoover, the defendant's claim agent, called at her house in the evening before the doctor came, but she did not see him; that he called the next day, together with Dr. Stone, the defendant's physician, before ten o'clock; that the accident happened Saturday, December 16th, 1899; that Dr. Stone wanted to make things easier for her, but she would not let him, because moving hurt her; that Dr. Keetch came after Mr. Hoover and Dr. Stone left; that Dr. Keetch and Dr. Stone made an engagement to examine her the next morning, Monday; that she was in bed twelve weeks; that, as the result of the accident, her left limb is shortened; that after the lapse of twelve weeks she could move around with the assistance of crutches; that she did not leave her room until six months had passed; that she used two crutches at first and must use one crutch at the present time; that she cannot bear any weight on her left limb at all; that she cannot put on her shoes and stockings; that she had fifty massage treatments from a trained nurse, at $2 per treatment.

On cross-examination this witness testified that the only person
9 in the car besides herself and daughter, when they reached 11th St., was a gentleman, who occupied the same seat that plaintiff did, namely, the first seat on the north side of the car, in the open part thereof, the seats in the open part running crosswise of the car and consisting of two tiers, one on the south and one on the north side thereof, with an aisle between; that when she left the seat to alight the gentleman was still sitting in it; that he did not get off of the car before she did; that the car was standing when she arose to get off; that she kept her seat until the car stopped, and got up as soon as it stopped; that she stepped on the running-board and looked towards the motorman to see if he handed the basket to her daughter; that as soon as her daughter reached to get the basket the car gave a jerk and she was thrown on her knees; that she is not positive whether the car started or gave a jerk; that she was on the running-board one second when the car started or jerked; that her daughter got off the car at the side before witness had gotten up to the motorman, before the car started; that she saw the motorman pick up the basket and hand it to her daughter, when she was thrown; that the conductor was standing at the rear end, counting fares; that she heard no bell for the car to start; that she got off on the running-board in front of the first

seat; that the car was standing still and the motorman was standing to the right of the platform, with the basket in both hands, in the act of handing it to her daughter, when the car jerked; that the motorman put the basket down and came running to her assistance; that some gentleman remained with her at the scene of the accident until folks came from her house to assist her; that she did not object to Mr.
10 Hoover and Dr. Stone coming into her room Sunday morning following the accident; that she does not remember whether they obtained her consent to see her; that she does not know who invited them in; that her daughter may have; that she lived on a farm eight or ten years prior to two weeks before the accident and was in the habit of walking eight or ten miles a day; that Mr. Hoover and Dr. Stone remained one-half an hour to an hour at her house; that she was talking most of the time to Mr. Hoover; that she knew who Mr. Hoover and Dr. Stone were; that Hoover was taking everything down in shorthand; that she told Mr. Hoover how the accident occurred; that he asked her to sign a paper, which she did willingly, because she felt sorry for the conductor; that Mr. Hoover represented to her that otherwise the conductor and motorman would be put off the car; that she thought the motorman was to blame, because she did not hear the conductor give the signal for the car to start, and she always thought the motorman was to blame for not stopping the car properly or for starting the car in handing the basket over, and that the motorman could have started the car by kicking or unloosening the brake with his foot; that she told Hoover she thought the motorman, not the conductor, was to blame; that she did not read the paper which she signed for Mr. Hoover, but that he read it to her; that she was so sick she could not read it; that Mr. Hoover offered to read it to her and did so; that she was under the impression that it was to reinstate the motorman and conductor to work; that Hoover wanted her to free the motorman and conductor from blame, but she said she would sign for the conductor, not for the motorman; that no one else was in the room at the time, her daughter and Dr. Stone being in an
11 adjoining room; that she recognized her signature to the paper which was now shown her, but she said it was not her statement; that Hoover spoke to her before making the writing; that she did not tell Hoover car slowed up; that she put her foot on the board and it gave a sudden jerk, and that she put no blame on the conductor or motorman; that she did not say she fell from the car, but said she was thrown from the car; that she said she would hold the conductor, but not the motorman, free from blame; that she does not recollect having told Hoover that the car did not start while she was getting off.

The paper above referred to, signed by the plaintiff, was thereupon offered in evidence and is in the words following:

"WASHINGTON, D. C., ——, —.

Parties receiving these blanks are requested to kindly state fully all that they observed concerning accident occurring on the 16th

day of December, 1899, at 11th & C streets N. E., to which we have your name as a witness. Please use ink.

I was a passenger on a car of the City and Suburban Railway Company on the evening of the above date, having boarded the car at the corner of Seventh and G streets N. W., and when the car neared 11th and C streets N. E. I signalled the conductor to stop. When the car was slowing down I stepped on the foot-board of the car and fell to the ground. The car did not start while I was getting off, and I do not think that the motorman or the conductor were guilty of negligence, and I hereby exonerate them from all blame.

Dec. 17, 1899.

(Signed) HEDVIG E. SVEDBERG,
418 11 *St. N. E.*"

12 All of the above statement from "I was a passenger," etc., through "from all blame" is admitted to be in Mr. Hoover's handwriting.

Thereupon the plaintiff, in order to maintain the issue on her part joined, produced as a witness OLGA SVEDBERG, a daughter of the plaintiff, who testified substantially to the same facts that her mother did. After testifying, on her direct examination, that after the car stopped she got off and went up towards the front of the car to get the basket from the motorman, she testified as follows:

By Mr. LIPSCOMB:

Q. Where was your mother when you got off the car? A. When I got off she was just rising, ready to get off.

Q. And what did you say, if anything, to the motorman? A. I don't remember saying anything to him.

Q. What did you do at that time, and what did he do? A. He handed the basket over. I didn't take it, though; but he handed it over with both hands.

Q. He handed it over? A. Yes, sir.

Q. Why did you not take it? A. Because I heard my mother scream, and I turned back to go to her.

Q. You heard your mother scream? A. Yes, sir.

Q. Where was your mother when you turned to go to her? A. She was thrown beside the car.

Q. What had caused her to be thrown beside the car? A.
13 When the motorman handed the basket over with both hands it caused a jerk.

Q. A jerk of what, Miss Olga? A. A jerk of the car.

On cross-examination this witness testified as follows:

By Mr. COLE:

Q. You say that after the car stopped you got out of the car on the right-hand side as you were facing east? A. Yes, sir.

Q. And you went up to the front of the car, where the motorman was? A. Yes, sir.

Q. You do not remember whether you asked him for the basket or not? A. No, sir.

Q. But he did hand it out to you? A. Yes, sir.

Q. And you say he held it in both hands—he used both hands in handing it out? A. Yes, sir.

Q. Do you feel quite positive of that? A. Yes, sir.

Q. How do you remember now that he handed it out with both hands rather than one? A. Because the basket was rather heavy. It required two hands to hand it over.

Q. How long had the car been standing still when you got up where the motorman was? A. I don't remember.

Q. It had been stopping a few seconds, I suppose. You did not start to get out of the car until it stopped, did you?
14 A. I waited until the car stopped.

Q. You waited until the car stopped before you rose from your seat to get out, did you? A. I know the car was still when I got off.

Q. Then when you got off the car it was still? A. Yes, sir.

Q. And you walked from there up to where the conductor was? That must have taken you two or three seconds, anyway.

The COURT: Do you mean the conductor or motorman?

A. I walked up to where the motorman was.

Mr. COLE: I mean the motorman; yes.

By Mr. COLE:

Q. And the conductor handed the basket out to you with both hands? A. The motorman handed it out.

Q. I beg your pardon; I mean the motorman. Was it where you could have taken hold of it if you had not been prevented from doing so by hearing your mother scream or hearing that she had fallen? I mean to ask whether he had gotten the basket near enough to you so that you could have taken it if you had not been prevented by your mother's falling?

(The witness did not answer.)

Q. Do you understand what I mean? A. Yes, sir; I believe I could have taken it.

Q. You could have taken it? You could have reached it from where you stood and where the motorman stood handing it to you? You could have reached it if you had not been prevented from doing so by your mother's falling? A. No, sir; he handed it right
15 over the fender. He had to put it over farther before I could reach it.

Q. You say he would have had to put it over farther before you could reach it? A. Yes, sir.

Q. Which side of the car was he on when he handed you the basket? A. He was on the right-hand side.

Q. That was on the side you were on, of course? A. Yes, sir.

Q. And was he right at the side of the car—right at the side of the platform? A. Yes, sir.

Q. Had he passed the basket out over the railing, over the dashboard or the gate or whatever you call it? A. No, sir; I think it was leaning on the gate. He had not lifted it over.

Q. It was leaning on the gate? A. Yes, sir.

Q. He had set it up on the gate? A. Yes, sir.

Q. And that was the position it was in when the car started forward and your mother fell, and that diverted your attention, and you went back to your mother without taking the basket? A. Yes, sir.

Q. That is the way it occurred, is it? A. Yes, sir.

Q. That is your recollection about it now? I say, do you remember distinctly now that it did occur that way? A. Yes, sir.

16 Q. Do you know what caused the car to start forward or jerk at that time? How did it happen? What made the car jerk and start forward? A. The motorman had the basket with two hands, and I suppose that caused the jerk. He had two hands on the basket.

Q. He had both hands on the basket? A. Yes, sir.

Q. And you suppose that is the reason why the car jerked? A. Yes, sir.

Q. You saw no other cause for its jerking except that he had both hands on the basket? A. When he picked the basket up he took two hands.

Q. Yes, and both hands were on the basket when the car jerked, were they? A. He was just about to pick the basket up with both hands when the jerk occurred.

Q. How is that? A. The jerk occurred when he put both hands on the basket.

Q. The car jerked when he put both hands on the basket, is that it? A. Yes, sir.

Q. I thought you said a moment ago that the car jerked when he was standing holding the basket on the railing for you to take. A. The jerk occurred when he let go of the lever to take both hands to put on the basket.

Q. Then the car jerked before he picked the basket up, did it? A. It jerked just as soon as he let go of the lever and put both hands on the basket.

17 Q. Did you see his hands when he let go the lever? A. No, sir; I saw his two hands on the basket.

Q. Where was the basket when you first saw his two hands on it? A. He was lifting it to hand it to me over the gate.

Q. He was lifting it up to hand to you over the gate. Now, had the car jerked at that time or did it jerk after that time? A. It jerked before.

Q. It jerked before that time? A. It jerked when he let go of the lever—when he put both hands on the basket.

Q. The car jerked when he let go of the lever to get the basket for you; that is true, is it? A. I don't quite understand.

Q. Why, I understand you to say now that the car jerked when the motorman let go of the lever to get you the basket? A. Yes, sir.

Q. Then you were mistaken a little while ago, or did not mean to say a little while ago that the car jerked as he was about to pass the basket out to you? A. It jerked when he let go of the lever to hand the basket out.

Q. The car was perfectly still, however, when he let go of the lever, was it? The car had stopped and was still before he let go of the lever? A. Yes, sir; it was still when I got off.

Q. And it had been still all the time until he let go of the lever to get you the basket? A. Yes, sir.

18 Thereupon the plaintiff, further to maintain the issues on her part joined, produced as a witness LULU SVEDBORG, a daughter of the plaintiff, who testified that she nursed her mother; that no one met Dr. Stone and Mr. Hoover at the front door the Sunday morning that they called, but that she (witness) found them together in her mother's room, no one being present but the three; that she and Dr. Stone were in an adjoining room while Mr. Hoover was talking to her mother; that Dr. Stone called her into an adjoining room; that the night before their family physician, Dr. Keech, had injected something to deaden the pain until he could return the next morning; that witness was the oldest member of the family present; that her mother suffered a great deal from pain; that she needed attention every minutes and hour of the day; witness could not find words to express her suffering.

On cross-examination this witness testified that when she learned that Dr. Stone and Mr. Hoover were there she did not inquire why they were there; that she found out who they were when they were about to take their leave, Dr. Stone telling her; that she was so excited that she did not request them to leave; that they remained there for at least one-half an hour; that she told Dr. Stone that Dr. Keech had been there the night before and was expected back that morning, but he did not wait; that the door between the two rooms was partly open; that Dr. Stone told the witness who he was, but not who Hoover was, and witness made no inquiry, knowing that he came with Dr. Stone; that no one admitted Dr. Stone and Mr. Hoover to the house; that they came in themselves; that she did not hear the door bell ring; that
19 they could have walked right in, and that they went in without any permission and without having seen any member of the family.

Thereupon the plaintiff, to further maintain the issue on her part joined, produced as a witness Dr. THOMAS R. KEECH, who testified that he had attended the plaintiff professionally for sixteen years; that he attended her for her injuries, calling at her house Saturday evening, the day of the accident, at ten o'clock p. m., and found her suffering dreadfully; that he did not fully examine her that evening on account of her pain, but gave her an hyperdermic injection of morphine to alleviate the pain.

This witness further testified on direct examination as follows, and the following proceedings were had:

Q. What did you do after you gave her that injection the next morning? A. I made some further examination. I think I gave her a little chloroform; not enough to fully anæsthetize her or to get her fully under the influence. I do not like to do, unless there is another physician present to take charge of her pulse, but I gave her a little. I think I gave her enough just to dull the severe pain, so that I could handle the limb without hurting her so much. I then made a more careful examination. After making that examination I was quite well satisfied that the neck of the thigh-bone—the femur—was fractured.

Q. That is called, in vulgar parlance, the hip-bone? A. Yes; sometimes.

Q. You must understand, Doctor, that neither we nor the jury know your medical terms. You say the hip-bone was fractured?

A. I would not call it the hip-bone. Of course, it is a
20 part of the hip.

Q. It is a part of the hip? A. Yes; but not what we call the hip-bone—not the pelvic bone. Of course the laity generally call it the hip-bone, but in speaking of it ourselves we would distinguish between the pelvic bone, which is commonly called the hip-bone, and the femur, or the neck or head of the femur.

Q. You found her injury there to what people commonly call the head of the hip-bone? A. Certainly.

Mr. BEHREND: The doctor has not said that at all. He has said directly the opposite.

Q. What did you find was injured, without using medical terms, if you please? A. I was speaking first of the most severe and prominent injury to the bone. I was satisfied that the neck of the femur was broken. This is a ball-and-socket joint. The socket is a part of the hip-bone, and the head of the femur fits into it like this (indicating) and rotates.

Q. By your examination, which part did you find was injured? A. It was here (indicating). I also thought, although that I could not be satisfied about, that there were pieces of this cup, which is a part of the pelvis, broken. There are often pieces of that broken off, and if you can designate that, if you are perfectly sure that is the case, then, of course, you have got a fracture of the hip-bone proper as well as of the femur.

By Mr. COLE: *Q.* If the court please, this lecture upon the subject is interesting, but I do not think it is proper for this jury to sit here and hear a general disquisition upon the subject. It is hardly
21 possible, from this answer, to tell what the doctor undertakes to say to the jury was the injury. The answer fails to identify anything, and we cannot tell from it whether he thinks the hip-bone was broken or not. I think the answer should be stricken out, and that counsel should confine themselves to asking him about what he found.

The COURT: The answer is in direct response to the question. It may not put it so definitely that the jury can fully understand it without further explanation, but I do not see why it should be stricken out.

Mr. COLE: There is another thing about it. I am very doubtful. I will put it stronger than that. I am very clear that this evidence is not admissible under this declaration. There is no allegation in this declaration of any fracture of any part of the bone of this leg, in the hip or otherwise.

(After full argument:)

The COURT: As has been stated, the purpose of pleading is to allege, especially in a declaration, in plain and distinct language, the charge which is made against the defendant, the purpose and object being to inform the defendant as to what he is to defend against. The question here is whether this injury is alleged with sufficient certainty to place the defendant upon his guard, and whether it notifies him of the nature and character of the injury which it is claimed resulted to the plaintiff from the agents and servants of the defendants.

I take it that it is not necessary the charge should be made in such language as would be beyond criticism, where scientific knowledge is necessary to a perfect understanding of the matter, and that a scientific description of an injury is not essential to be used
22 in the declaration, but that popular language may be used, having such significance and meaning as would point directly to the character and nature of the injury with sufficient distinctness to notify the defendant what the charge against him is.

It is stated in this declaration that this lady travelled upon a car of the plaintiff, and by reason of the negligence of the defendant or the defendant's servants, which is described in the declaration, but to which I need not refer at the present time, she was violently thrown to the ground, and by reason thereof was cruelly bruised and injured about the knee, and the muscles of her body were greatly sprained and wrenched. Had the declaration stopped there it might be very questionable whether or not any other injury could be shown—whether it could be shown that any bones had been fractured, especially about the hip. That is where the original declaration stopped in its description of the injury. It stated that she was thrown to the ground and cruelly bruised and otherwise injured about the knee and hip. But the amended declaration goes on and says that she was cruelly bruised and permanently injured about the left hip, and that said hip was permanently fractured, and her left leg was permanently shortened, and she became lame and unable to walk without the aid of a crutch.

I think that is a sufficient allegation to admit evidence to go in tending to show that there was a fracture of the bone or bones of the hip. Certainly the most prominent part of that part of the body is the bone, although it is made up, of coure, of muscles, nerves, flesh, and blood as well as of bone. But the term "fracture" is more

commonly applied, in my judgment, and more aptly applied to a broken bone than the broken muscles or ligaments or nerves. A more common term to apply to the latter would be "lacerated."

23 At any rate, it is very certain that the "fracture" is aptly and properly applied to the bone, and the hip being fractured and the hip having therein bones, it would be included in that description and would place the defendant upon notice that the plaintiff was intending to show a fracture of the hip, and that in all probability it might be or would be an injury to the bone itself, especially as it is stated that the left leg was permanently injured and shortened.

I am inclined to think that the description is sufficient to justify the admission of the evidence.

Mr. COLE: Will you allow me an exception?

The COURT: Yes, sir.

Mr. COLE: I need not repeat the exception. I want the exception to be broad enough to cover any evidence that goes in relating to the fracture of a bone of any kind; then I need not repeat the objection and exception.

Mr. LIPSCOMB: Then I think I will withdraw my question temporarily. I may ask it again.

By Mr. LIPSCOMB:

Q. I will ask you, Doctor, to state the result of your investigation on this next morning of the lady's hip, and what, if any, injury you found to the hip, using the word "hip" in the plain way that we use it and not as you medically use it. A. After a careful examination——

Mr. COLE: I want to know now just what status we are in here. The objection was made to any evidence in reference to a fractured bone and the court has overruled it.

The COURT: Yes.

24 Mr. COLE: And I have taken an exception to the ruling of the court. Now he says he withdraws that question and asks the doctor to state what he found there. I submit that he cannot say anything about a bone if that question is withdrawn, because that would be getting in the evidence and not giving me the benefit of my exception.

The COURT: You can move to strike it out if he answers anything about it; it is precisely the same thing.

Mr. LIPSCOMB: His honor perfectly well knew why I did what I did do. It was not that I did not firmly believe his honor's ruling was absolutely correct——

Mr. COLE: No; but I do not want these things to get in here and the question be withdrawn and I lose the benefit of my exception, and then have the same evidence in the record that I would have had if I had made no objection. That is what I want to guard against.

The COURT: I think you can cover that point by moving to strike the testimony out.

Mr. COLE: All right.

By Mr. LIPSCOMB:

Q. Go on then, Doctor, and state the result of your investigation and let Brother Cole have his exception. A. She was still suffering with this severe pain and disability, and, after a careful examination, I found that this bone was broken——

Mr. COLE: Now, I move to strike that out.

The COURT: Yes.

Mr. COLE: I move to strike that out unless you let your question stand. I am entirely willing to take the ruling of the court and let my objection be overruled, and let me have my exception.

Mr. LIPSCOMB: If I can get my statement in I will ask the
25 doctor the injury he found about the hip.

Mr. COLE: Now, your honor, I submit that there is no way to whip anything around a stump here. Either the gentleman is right——

The COURT: There is no trouble in the world about it. It is not worth while to consume time in argument. If you ask him if he found broken bones there, Mr. Lipscomb, and Judge Cole objects to that as not being responsive to the question, he can make a motion to strike it out, and the court will overrule it and let him take his exception.

Mr. LIPSCOMB: I will put my question again, if I can, your honor.

The COURT: You have put the question, and he has made the answer. Do you want to put it again?

Mr. LIPSCOMB: Then I will go along.

Mr. COLE: I move to strike out his answer, that he found a broken bone.

The COURT: That is what you have already done, as I understand.

Mr. LIPSCOMB; Yes; twice or three times.

Mr. COLE: Yes; I have made that motion. Your honor overrules that, as I understand.

The COURT: I overrule that.

Mr. COLE: And I have my exception.

Mr. LIPSCOMB: Now I think we can go along and talk about it.

Mr. COLE: Yes, go on.

By Mr. LIPSCOMB:

Q. Now state, if you will, what injuries to the hip you
26 found. A. I found that this bone, the neck of the femur (which certainly is a part of the hip) was fractured, and that in consequence of that the limb was entirely useless. She could not move it, nor could she bear it to be moved except with extreme pain. I knew that in consequence of that fracture of the bone there would necessarily be some shortening of the limb——

Mr. COLE: Wait a moment.

Mr. LIPSCOMB: I do not insist upon that.

Mr. COLE: I want to move again to strike out from this answer all reference to a broken bone.

The COURT: You can move to do so.

Mr. COLE: I understand there is the same ruling and the same exception.

Mr. LIPSCOMB: If the court will pardon me a moment, I do not want the record to go up against me in an improper condition. The doctor said, "I knew that the result of this would be a shortening of the limb." I do not want him to answer that he knew the result would be so and so.

I am going to ask him what it actually was, and then I will stand in an impregnable position. I am going to ask him if he found the limb was shortened, and he will answer that it was, and I will let the jury guess as to what was the cause of it. If he should say "I knew it would happen," and if the record should go up in that form, I agree that it might be erroneous. I think his answer might be modified to that extent. I think I will give you what you want.

Mr. COLE: I do not know——

Mr. LIPSCOMB: No; you want it in in that other way.

Mr. COLE: I simply want to strike out from your last answer all reference to a broken bone, and I am willing to take your honor's ruling upon it, overruling it. I want an exception to that.

27 The COURT: But it is not necessary, probably, to repeat the exception each time. He may mention something about a broken bone a dozen times before he gets through with his answer. It is just as well to have it understood that your exception runs to everything on this point.

Mr. COLE: My exception runs to everything he shall say hereafter about a broken bone.

Mr. JANNEY: That is what we understand.

Mr. COLE: Just so that is understood, that is all I am after.

The COURT: If the court is right in its ruling that it has already made, it is perfectly proper for him to speak of finding a bone broken there about the hip—constituting the hip.

Mr. JANNEY: Certainly, we rely on the decision of the court.

The COURT: I cannot see for a moment why, if that is competent, it is not also proper for him to say that the limb was shortened, so that he, from his professional knowledge, knew that one result of that broken bone would be a shortening of the limb. Then he can testify, if you choose to have him, as to what the fact has proved to be.

Mr. LIPSCOMB: Very well, your honer.

The COURT: This is all objected to by Judge Cole, of course, because it hinges upon the fracture of the bone, which he claims is not competent under the declaration. The court differs with him in the opinion about that, and he takes his exception, to which he is entitled.

Mr. COLE: Yes; so that I have the benefit of the exception reserved, that is all I care for.

The COURT: While I sit here, you shall have the full benefit of all exceptions.

Mr. LIPSCOMB: Very well.

28 By Mr. LIPSCOMB:

Q. Go ahead, Doctor, and state what you found as injuries about the hip and the hip-bone, and all the injuries that you saw there, and the effects of those injuries. A. I found this fracture of the neck of this bone. There was at that time some shortening, and I knew then (and that was the part that concerned me most) that there would be increased shortening, because the muscles of her hip would draw the long part of her bone up above the point where it was fractured. That is what causes the shortening and that is what did cause it.

This witness further testified, on direct examination, that the plaintiff has always, since the accident, had to use crutches—at first two, at present one.

On cross-examination this witness testified that the fractured parts of the bone united *into* from eight to twelve weeks; that the bone is never as strong as before; that the plaintiff could bear the weight of her body on it and walk on it; that she might be able to carry the weight of a small child, but with the risk of falling; that plaintiff probably has pains at times; that she may or may not have them; that when still she has no pain.

The foregoing being all of the testimony on the part of the plaintiff, the defendant moved the court to direct the jury to return a verdict for the defendant for the reason that the evidence was insufficient to justify a finding by the jury that the defendant was guilty of negligence; but the court overruled the motion, and the defendant then and there noted an exception.

29 The defendant, to maintain the issue on its part joined, produced as a witness GEORGE P. HOOVER, who testified that he was the claim agent of the defendant company, charged with the duty of interviewing persons who had been hurt by accidents on the road of the defendant company, and also interviewing the witnesses to the accidents; that he called at the plaintiff's house the night she was injured and was asked to call for a doctor, which he did; that he returned Sunday morning with Dr. Charles G. Stone; rang the bell to the house and was permitted to enter by a lady; that he announced to the lady his mission; that he is not positive whether it was the plaintiff's daughter who let him in or another lady who was there; that he found plaintiff on the bed and introduced himself to her. She had a chair against the side of the bed, in which she had some pillows, and she was propped up on that; that Dr. Stone and plaintiff's daughter were in and out of the room; that the other lady and complainant's younger daughter were there; that he asked plaintiff certain questions and received certain answers thereto, both of which he reported stenographically; that after the statement was obtained he wrote out in longhand the substance of the statement, read it to the plaintiff, and she signed it; that she was perfectly rational at the time, and understood what was going on; that Dr. Stone was in the room when the statement

was signed; that he is pretty certain that plaintiff's eldest daughter was there; that she was in and out of the room all the time; that the other lady referred to was in the room when the paper was signed, and witness was introduced to her; that plaintiff did not tell witness she blamed the motorman and not the conductor, but said she blamed neither.

30 This witness further testified that plaintiff told witness that she knows the car slowed up and she put her foot on the board and it gave a sudden jerk, and that she did not put any blame on the conductor or motorman; that the car did not start, because the motorman handed her the basket just as she got up and would not start the car before the basket was delivered; that the car did not start while she was getting off.

On cross-examination this witness testified that either plaintiff's eldest daughter or the neighbor referred to let witness and Dr. Stone in the house; that he did not get plaintiff's statement Saturday night, because plaintiff wanted a doctor and he though- it best to get the doctor first, and because the plaintiff was too nervous to make any statement; that she was composed the next day; that he drafted the paper which plaintiff signed; that plaintiff did not say that she did not want the conductor discharged and did not want him blamed, but blamed the motorman; that he (witness) said nothing to plaintiff about discharging the men.

In the course of this witness's cross-examination, after the statement signed by the plaintiff had been read to him, the following took place:

* * * * * * *

Q. Is that your language or hers? A. That is my language.

Q. On what did you base that language? A. I based that upon the statement I secured from her.

Q. In your notes? A. Yes, sir.

Q. Have you written out your notes in this other paper?

31 A. That is a transcript of my notes (referring to a paper in Mr. Behrend's hands).

Q. Is it a correct and entire transcript of everything that transpired there? A. We had some general talk after the statement was made. I had a conversation with her daughters, and I never put that down, because it had no material bearing on the case.

Mr. LIPSCOMB: I think we are entitled to call for this other paper.

The COURT: Is there any objection?

Mr. BEHREND: I have stated before this paper is merely a transcript from Mr. Hoover's notes of the interview which took place between him and Mrs. Svedborg. When Mrs. Svedborg *when Mrs. Svedborg* was on the stand she was asked whether or not Mr. Hoover did not ask her several questions and receive several answers to those questions, and Mrs. Svedborg said no. Now we ask Mr. Hoover, irrespective of this paper, whether he did not ask certain questions and receive certain answers to those questions. It does

not seem to us that there is any rule of evidence upon which this paper becomes theirs. It is merely a private paper.

The COURT: You read from that paper certain questions and certain answers and asked him whether they were correct. Counsel now, upon cross-examination, further asked the witness if he took down the answers made by the plaintiff to the questions which you put to him on that occasion, and he says he did take them down in shorthand and afterwards write them out, and that this is a transcript from his notes. I think they have the right, on cross-
32 examination, to test the accuracy of this witness and see whether his statements are borne out by what he says is a transcript of the notes which he made on the occasion.

* * * * * * *

I think it is competent, especially as he said he made the general statement signed by her, from the questions and answers which had previously been taken down by him in shorthand.

Mr. BEHREND: Does your honor rule that we are required to produce this paper?

The COURT: The paper being here and having been used by you, you cannot say that they have no right to inspect the paper on the cross-examination of this witness.

Mr. BEHREND: If your honor rules that we have to do it, we will do it.

Mr. LIPSCOMB: I suppose you will. There is no escape from it if his honor so rules.

Mr. BEHREND: We will permit the other side to have it, but we reserve an exception to your honor's ruling.

The COURT: You have the exception.

Mr. BEHREND: It seems to me that in a case of this kind, where a paper is called for, it becomes evidence in a case and must be read to the jury. I understand the rule to be that where a paper is called for and is produced that paper becomes evidence in the case.

The COURT: Our practice here, I think, is not to make it evidence unless it is offered by one party or the other. It may be produced for inspection.

By Mr. LIPSCOMB:

Q. I am going to read from this paper, Mr. Hoover, and ask you if you will be kind enough to examine the notes which you
33 say you have in your pocket? A. Yes, sir.

Q. Would you object to reading your notes and letting me follow this transcript as you read them? A. Not at all, sir.

Mr. BEHREND: If your honor please, we want to make our position in this case perfectly clear, so that the record may go to the Court of Appeals in proper manner.

This witness, Mr. Hoover, having been produced in order to contradict Mrs. Svedborg in regard to some questions which he asked her and some answers which he obtained to those questions. Now, if in any of the answers that were made at the time were self-serv-

ing declaratious, then, according to the rules of evidence, they are unquestionably not admissible. We want it clearly understood now that any answers which the witness may have made which were self-serving are objected to, and if they should come out in evidence we desire to reserve an exception. This evidence is also inadmissible as being hearsay.

The COURT: It is clearly competent for the purpose of cross-examination as affecting the testimony of this witness who is upon the stand.

Mr. BEHREND: We merely want to make the point clear and to reserve an exception.

The COURT: If it is competent for any purpose, it may be admitted. The offer is not made as yet to admit it in evidence.

Mr. BEHREND: If the paper is read and the witness is required to make any statement about what transpired between him and Mrs. Svedborg on that evening, it is practically before the jury.

34 The COURT: You introduced a part of the conversation, and it is entirely competent on cross-examination to call out the other part of that conversation.

I have no doubt about the competency of the testimony.

Mr. BEHREND: We note an exception.

By Mr. LIPSCOMB:

Q. In this statement—I will ask you first if it includes all that was said to you. A. Yes, sir; it includes the whole statement.

Q. I mean to ask whether what is found on these two pages of typewriting or one page and a little over a fifth of another page of typewriting contains all the conversation that took place between you and her at that time? A. You mean at that interview?

Q. At that interview. A. No; there were other things conversed about between us which are not there.

Q. You did not put them down? A. No, sir; those things were on general subjects. She talked to me about her farm in Virginia and about her daughter.

Q. Then this is not a correct transcript of the entire conversation? A. That is the correct transcript of the statement of Mrs. Svedborg in answer to my questions as to how the accident happened to her; that is what the statement is.

Q. Your first question is: Q. Please state how the accident happened.

Which was answered and you transcribed it on your notes in this way——

35 Mr. BEHREND: We desire to object to the question in so far as it calls for any answer which contains self-serving declarations, and in so far as any answer to the question may bring out a declaration that is self-serving. We object to it, your honor overrules the objection, and of course we have our exception.

By Mr. LIPSCOMB:

Q. Did she answer, "I came down on G street and 7th street and

handed the motorman the basket"? You have stricken out here "conductor" and written "motorman." A. Motorman is correct.

Q. "I just came out from the farm and came home on the train, a little girl coming with me, and the cars had been delayed, so it was two or three after each other, and this was the first car, and it seemed to me after I stood on the board it stopped and gave a terrible jerk, and I supposed it was the electric thing that shook the whole car, and I just fell on my hip and scared the little girl terribly." A. Yes, sir; that is correct.

Q. She told you that in answer to your first question? A. Yes, sir.

Q. This is your next question: "Q. Did not you step off the car before it stopped?" And she answered, "The car stopped and I was standing on the board." A. Yes, sir.

Q. The next is: "Did not you step off the car before it
36 stopped?" And answer, "I know the car stopped and I put my foot on the board and it gave a sudden jerk. I do not put any blame on the conductor or motorman." A. That is correct, sir.

Q. You asked her: "Can you recollect that you stepped off the car before it stopped?" and the answer is: "No; I cannot recollect that, because I am so very careful, but I know I stepped on the board and I said, 'You take the basket.' He did not start the car before the other car came right up back of it." A. That is correct, sir.

—. "The car did not start while you were getting off?" A. "No, indeed."

Q. "You do not blame the motorman or conductor for it?" A. "No; I do not blame the conductor or motorman for it. They did not start the car." A. That is a correct statement.

Mr. BEHREND: While it may not be very material, we desire to move that any matter brought out on this examination which consists of declarations that are self-serving in their nature be stricken out.

The COURT: For the purpose for which they are admitted they are not self-serving declarations, and no matter if they were they affect the testimony of the witness.

Mr. BEHREND: We reserve an exception, your honor.

* * * * * * *

37 The defendant, further to maintain the issue on its part joined, produced as a witness WALTER WALTERS, who testified that he was the conductor on the train from which plaintiff had her accident, being employed at the present time with a railroad company in Pittsburg; that he signalled the motorman to stop at 11th & C streets; that just before the car came to a stop the lady walked off; that the car went from two to two and a half feet after plaintiff got off; that the gentleman who was on the car got off of the car before plaintiff did; that when the plaintiff got off her daughter was in the aisle of the car, walking towards the running-

board of the car; that the car stopped only once at 11th & C streets, plaintiff jumping off before the car came to a stop; that the gentleman who was on the car (Meade) got off while the car was in motion; the little girl did not get off while the car was so moving; that just before the car stopped witness gave three bells, because he saw plaintiff was going off and wanted car to stop as soon as possible.

On cross-examination this witness testified that the cars were on time, and that other cars came up while his car was standing there; that he did not ring three bells when the gentleman (Meade) alighted, because men jump off often—not ladies; that he was on the rear end of the car when he grave the bell, and did not come up front until the lady jumped off.

On redirect examination he testified that the car stopped about twelve minutes; that he helped to pick the plaintiff up with the assistance of the gentleman (Meade).

38 On recross-examination he testified that he never saw the basket of eggs.

The defendant, further to maintain the issue on its part joined, produced as a witness A. H. HUNT, who testified that he was the motorman of the car, having been a motorman ever since the electric cars have been on the line; that he got a bell at 10th & C streets to stop at 11th street; that just before car stopped he heard the conductor call to the lady to wait until the car stops; that he got off of the car to see what was the matter, and they had the plaintiff on her feet; that the car moved about four feet after receiving the three bells; that he was just coming to a stop; that cars did not come right up behind witness's car while he was waiting there; that he does not remember anything about the basket of eggs; that he put on the brakes as hard as he could and threw off the current, throwing the current off first; that the car cannot be stopped without throwing the current off; that the car cannot start, after it has stopped, without putting on current; that the car cannot be jerked without putting current on; that there cannot be a jerk after brake is off, unless there is a hill; that it is level at the point of accident; that the car would not start with current off; that the car stopped once at the corner; that when the car stopped plaintiff was in the street; that the current is governed by the controller, which is in the left-hand side of the front of the car, and that the current cannot be put on except through the use of the controller; that when standing by the gate on the right side of the car he cannot

39 reach the controller; that the brake is not operated with his feet; that a dog holds the brake after his hands are off, and that in order to release the brake the dog is removed from the ratchet on the brake rod.

On cross examination he testified that he heard the conductor call to the lady; that he saw the little girl; that he did not hand her any basket and did not remember her having a basket of anything; that he heard no scream; that the car could not move for-

ward, if the brake is taken off after it has stopped, if there is no grade; that the brake can be taken off at the place of the accident, and the car won't move.

Thereupon the defendant, further to maintain the issue on its part joined, produced as a witness Dr. CHARLES G. STONE, who testified that he called at the plaintiff's house on December 17th with Mr. Hoover; that the bell was rung and they were admitted, as well as he remembered, by a lady, and taken into plaintiff's room; that Mr. Hoover stated their business to the lady or to plaintiff's daughter; that Mr. Hoover took the plaintiff's statement while witness was talking to the plaintiff's daughter, a part of the time in plaintiff's room and a part of the time in the front room, adjoining the plaintiff's room, where he called the daughter to talk to her about becoming a nurse, about which they had been talking before; that he saw the plaintiff sign the paper that was offered in evidence; that Mr. Hoover read the paper; that plaintiff was perfectly rational, speaking freely; that plaintiff told witness the accident was the result of her hastening to get off of the car to get her basket, and also that she did not blame the company; that he was introduced when he first entered the house as surgeon of the defendant company; that on December 17, when leaving the house with Mr. Hoover, he met Dr. Keech and told him that he should like to make an examination with him; that they returned and gave the plaintiff a hypodermic injection and waited a few minutes to see if it would relieve the pain any and undertook an examination; that witness then told Dr. Keech that because of the rigidity of the limb and the great pain and suffering caused by the movement thereof, it would be better not to make an examination without an anesthetic, and they made an appointment for the next day, Monday; that where a fracture of the femur occurs in persons fifty years of age, if there has been a firm bony union, the limb should be useful two years after the accident; that in such cases patients can generally by that time get along without crutches.

On cross-examination this witness testified that the plaintiff told him that she was in a hurry to get off car and did not blame the company; that he did not enter into a talk with the plaintiff, but the plaintiff told this to him; that he was not positive that Mr. Hoover was in the room at the time; that Mr. Hoover and he were in the house for half an hour, and that it was immediately after this that he returned with Dr. Keech, when they determined that they should not make an examination without an anesthetic because of the great pain and suffering produced by movement of the limb.

Thereupon the defendant, further to maintain the issue on its part joined, produced as a witness ALBERT R. MEADE, who testified that he was on the car from which plaintiff had her accident, boarding it at the corner of 9th and G streets N. W., the plaintiff board-

ing the car when it reached 7th & G streets N. W., taking a
41 seat beside witness; that just before the car reached its stopping place at 11th and C streets N. E. witness left his seat and alighted therefrom while the car was still in motion; that he left the seat before plaintiff did; that just after he alighted from the car he heard a noise, and, looking around, saw the plaintiff in the rear of him on the ground; that at that time the car had not quite come to a stop, but stopped a few seconds afterwards; that he did not see the plaintiff's daughter before the accident, but afterwards; that he helped plaintiff up and gave his name to the conductor.

On cross-examination he testified that he was one-half of a foot from the car when the plaintiff fell; that he alighted from the car before plaintiff; that he saw the plaintiff on the street before the car had stopped; that he did not see plaintiff's daughter leave the car, and does not recollect having seen the basket; that he does not know how old he is, his family Bible having been burned in a fire; that he was employed by the Baltimore and Ohio railroad for twenty years as a passenger brakeman; that he was relieved from duty because of an accident; that he then worked for the Baltimore and Lehigh railroad, which he left because it became bankrupt; that he then worked for a summer suburban road in Baltimore; that he then came to Washington and worked for five or six years as a motorman on the Metropolitan railroad; that he was discharged by it for an accident which occurred because a colored woman got too tired to get out of his way, and he hit her with the fender of the car; that he then went to work for the Great Falls Company as a motorman, but resigned because it was too cold in winter;
42 that he then again went to work for the Metropolitan railroad and was employed in making electrical repairs; that he was thus employed at the time of the accident in this cause; that afterwards he drew his time and went to work for an express company in Wilmington; that he is now employed by the Philadelphia and Reading railroad, in relation to which he gave the following testimony:

By Mr. LIPSCOMB:

Q. You are employed by the Philadelphia and Reading? A. Yes, sir.

Q. As what? A. I told you special business.

Q. On the contrary, you stated that the special business was the care of property. A. That is my special business there—taking care of the property.

Q. What property do you look after? A. Anything pertaining to trains and cars around the yard.

Q. Do you mean you are a detective? A. Well, it is similar duty.

Q. Similar duty to that of a detective? A. Yes; you are not rated that way, though; it is only called special work.

Q. Why didn't you tell us in the beginning you were doing

detective work for this Reading road? A. I told you special business.

Q. Did you have any reason for wanting to conceal this? A. Not a bit, sir; no, sir.

On redirect examination he testified that the car went
43 about two feet after plaintiff fell, and that the car stopped but once at the corner, and that about one second elapsed between the time witness jumped off and when plaintiff was on the ground.

Thereupon the defendant, further to maintain the issue on its part joined, produced as a witness H. B. MATHIOT, who testified that he was a motorman in the employ of the defendant company, having been such for six years; that at the time of the accident the car on which he was motorman was about one-half a square in the rear of the car from which plaintiff had her accident; that he saw the witness Meade jump off of the car and start towards the pavement, and next saw plaintiff falling in the street; that just as the plaintiff fell he heard the conductor give three bells, when the witness Meade turned towards the plaintiff; the car had not stopped before plaintiff fell; that there is nothing on the platform of the car by which it can be started with the foot; that the grade at 11th & C streets is pretty near level.

On cross-examination this witness testified that he was not a witness at the last trial; that the company did not know of him as a witness, and only found him out the night before; that he heard the case had started, and spoke of it to George Tyser, another motorman, who was on his car, and told him (Tyser) that he saw it; that this morning, when he asked to get off for the day, the clerk at the office told him he was wanted at court, and sent him to Judge Cole's office. He further testified that the cars were all behind time that evening; that plaintiff's daughter Olga got off of the car after the accident; that the witness Meade had reached the curbstone when plaintiff got off; that he supposes the distance between the
44 curbstone and the track is twenty feet; that the car moved about two feet while Meade was walking the distance of twenty.

On redirect examination this witness testified that the car stopped but once at that point, and when it did stop the plaintiff was on the ground.

Thereupon the defendant, further to maintain the issue on its part joined, produced as a witness Dr. JAMES KERR, who testified that the plaintiff would always be lame; that she would have fairly good use of her limb, and in time would be able to have moderately good use of it, and should be able to walk without the assistance of a crutch ultimately; that a good and solid union is obtained where a patient is fifty years old.

Thereupon the defendant, further to maintain the issue on its part joined, produced as a witness HENRY D. YATES, who testified that the

width of C street is thirty-two feet; that the width of the track is five feet, and that the distance from the track to either curb is thirteen and a half feet.

Thereupon the defendant, further to maintain the issue on its part joined, produced as a witness CHARLES FERNALD, a civil engineer in the employ of the District, who fixed the grade — the tracks, who testified that the grade from Tenth to Eleventh streets is eight inches in one hundred feet, the descent being from Eleventh towards Tenth street; that the grade between Eleventh and Twelfth streets northeast is six inches in one hundred feet, the descent being from Eleventh towards Twelfth streets; that any grade less than two per cent. is considered a flat grade; that the track across Twelfth street is substantially level.

45 Thereupon the defendant, further to maintain the issue on its part joined, produced as a witness ROBERT E. LEE, who testified that he was the general superintendent of the defendant company; that the only means of applying the current to start the car was by a controller on the front of the car; that when the car is stopped by applying the brake, the dog, which holds the brake, cannot be released by a kick of the foot without first putting pressure on the brake-handle, when the dog can be kicked out of the ratchet. He further testified that if the controller had been turned off except one point and the brake put on, but the dog not put in use, on removing the motorman's hand from the crank the car would start.

Thereupon the defendant, further to maintain the issue on its part joined, produced as witnesses WILLIAM WERE and GEORGE B. TYSER, who testified that they were motormen in the employ of the defendant company; that they made experiments with the car from which plaintiff had her accident; that they ran the car to 11th and C streets northeast, threw the current off, applied the brakes, and, when the car stopped, threw the brakes off quickly, in order to see if the car would start forward; that the car did not start forward at either trial; that the car was stopped on the west side of 11th street; that they then set the brakes, put the controller on five points, to see if the car would move with the brake and current on, and it did not; that it is impossible to kick the dog out of the ratchet without first taking hold of the brake and putting pressure upon it.

Thereupon, the foregoing being all the evidence, the counsel
46 for the defendant moved the court to direct the jury to return a verdict for the defendant on all the evidence; which motion the court denied, and the defendant excepted; whereupon the court, at the plaintiff's instance, granted two prayers, and at the defendant's instance, six prayers. The defendant also requested the court to grant the following instruction:

"In order to entitle the plaintiff to a verdict, the burden is upon her to prove by the preponderance of the evidence, to the satisfac-

tion of the jury, that the car stopped for her to alight, and that while she was in the act of alighting, the car, through the negligence of the motorman, started, and thereby threw her to the pavement and injured her, and unless, upon the whole evidence, the jury shall so find, the verdict should be for the defendant."

The court refused to grant this instruction without inserting after the word "motorman" the words "or conductor or both." Upon the insertion of these words the prayer was granted, and the refusal of the court to grant the prayer as originally asked, and to its granting as modified by the court, the defendant then and there noted an exception.

The defendant also requested the court to instruct the jury as follows:

"The jury are instructed that under the evidence in this case they cannot find any negligence on the part of the conductor of the car, and unless they shall find from the evidence that the motorman was guilty of negligence which caused the accident to plaintiff, they should find for the defendant, and in considering that question they cannot infer the existence if any fact not shown to their satisfaction by the evidence."

47 The court refused to grant this instruction, and to its refusal so to do the defendant then and there noted an exception.

After the court instructed the jury the jury retired to consider of their verdict and returned a verdict for the plaintiff in the sum of $6,500; which verdict, upon motion of the defendant for a new trial, the trial court refused to disturb.

All of the exceptions shown in the foregoing bill of exceptions were duly noted by the court in its minutes at the time the same were severally taken, and before the jury retired to consider of their verdict, and the said several exceptions are signed as the several exceptions taken at the trial of the above-entitled cause, and made a part of the record this 4 day of April, 1902, as and for the 18th day of February, 1902.

E. F. BINGHAM. [SEAL.]
Chief Justice.

Memorandum.

April 4, 1902.—Time to file transcript of record in Court of Appeals extended to April 25, 1902.

48 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 47, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 43965, at law, wherein Hedwig E. Svedborg

is plaintiff and The City and Suburban Railway of Washington is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District. this 11th day of April, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1210. City and Suburban Railway of Washington, appellant, *vs.* Hedwig E. Svedborg. Court of Appeals, District of Columbia. Filed Apr. 25, 1902. Robert Willett, clerk.

THURSDAY, *October* 23*d*, *A. D.* 1902.

CITY AND SUBURBAN RAILWAY OF WASHINGTON, Appellant, *vs.* HEDWIG E. SVEDBORG. } No. 1210.

The argument in the above entitled cause was commenced by Mr. R. B. Behrend attorney for the appellant, and was continued by Messrs. Philip Walker and A. A. Lipscomb attorneys for the appellee, and was concluded by Mr. C. C. Cole attorney for the appellant.

CITY AND SUBURBAN RAILWAY OF WASHINGTON, Appellant, *vs.* HEDWIG E. SVEDBORG. } No. 1210.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an action to recover damages for an injury to the person of the plaintiff, caused by the alleged negligence of the defendant, while the plaintiff, a passenger, was alighting from one of the defendant's street cars in the city of Washington. The injury complained of consisted of the fracture of one of the thigh-bones of the plaintiff, and other injuries and bruises of her body. At the time of the accident the car was bound east on C street, near the intersection of Eleventh street, N. E.

The declaration alleges that the car stopped for the plaintiff to alight at the place just mentioned, and that while she was in the act of alighting the car was suddenly started again before the plaintiff had reached a position of safety upon the ground, by reason of which motion the plaintiff, though using reasonable care, was thereby violently thrown to the ground, and was thereby greatly bruised and injured about the knee, and the muscles of her body were greatly strained and wrenched, and she was greatly bruised and permanently injured about the left hip, and the said hip was permanently fractured, and her left leg was permanently shortened, and she became lame and unable to walk without the aid of a crutch, etc. To this declaration the defendant pleaded not guilty, and, upon trial, the verdict and judgment were for the plaintiff, and the defendant has appealed.

At the trial, the defendant sought by prayer to have the case taken from the jury, upon the ground that the evidence did not warrant a verdict for the plaintiff. This effort was based upon the ground of the supposed want of sufficient evidence of negligence on the part of the defendant in producing the injury, and because, as contended, the injury complained of was produced by the negligent

act of the plaintiff herself. The court refused to withdraw the case from the jury.

The material facts proved on the part of the plaintiff that relate to the occurrence of the accident, and upon which the court below submitted the case to the jury, are contained in the testimony of the plaintiff herself, and that of her daughter, who was present at the time and place of the accident, and was a witness at the trial for her mother.

The plaintiff in her testimony states, that she is a widow, fifty years old, living on Eleventh street, northeast; that on the evening of the accident she was on her way home from her country place in Virginia, and that her daughter, then fourteen years of age, met her at the depot; that she had brought with her from the country a basket containing eggs and other articles; that she and her daughter boarded the defendant's car at Seventh and G streets going east; that the car, which was a combination car, the closed part being in front and the open part in the rear, was crowded; that she took a seat in the open part of the car and her daughter in the closed part; that before boarding the car she handed to the motorman thereof her basket; that when the car neared her destination, Eleventh and C streets, northeast, there was only one other passenger, a gentleman, in the car besides herself and daughter; that the car stopped at Eleventh and C streets—on the west side thereof—and her daughter alighted; that while her daughter was walking up towards the front of the car to procure the basket from the motorman, she attempted to alight, when the car jerked forward and threw her to the ground; that she got up and fell again; that she does not know who picked her up; that the conductor came to her assistance, and the motorman came running through the car; that she was carried from the scene of the accident to her home by friends; that her family physician called that evening and found her in bed, and he administered morphine to relieve the pain; that Mr. Hoover, the defendant's claim agent, called at her house the same evening before the doctor came, but she did not see him; he called the next day, together with Dr. Stone, the defendant's physician, before 10 o'clock; that the accident happened Saturday, December 16, 1899.

On cross-examination she stated, that the car was standing when she arose from her seat to get off; that she kept her seat until the car stopped, and got up as soon as it stopped; that she stepped on the gunning board and looked towards the motorman to see if he handed the basket to her daughter; that as soon as her daughter reached to get the basket the car gave a jerk and she was thrown on her knees; that she is not positive whether the car started or gave a jerk; that she was on the running board a second when the car started or jerked; that her daughter got off the car at the side before witness, and had gotten up to the motorman before the car started; that she saw the motorman pick up the basket and hand it to her daughter, when she was thrown. She further stated on cross-examination, that Mr. Hoover interviewed her on Sunday morning, and that he took everything down in shorthand; that

she told Hoover how the accident occurred; that he asked her to sign a paper, which she did willingly, because she felt sorry for the conductor; that Mr. Hoover represented to her that otherwise the conductor and motorman would be put off the car; that she thought the motorman was to blame, because she did not hear the conductor give the signal for the car to start, and she always thought the motorman was to blame for not stopping the car properly or for starting the car in handing the basket over; that she told Hoover she thought the motorman, not the conductor, was to blame; that she did not read the paper which she signed by request of Hoover, but he read it to her; that she was so sick she could not read it; that Hoover offered to read it to her and he did so; that she was under the impression that it was to reinstate the motorman and conductor to work; that Hoover wanted her to free the motorman and conductor from blame, but she said she would sign for the conductor, but not for the motorman. The paper was produced and shown to the plaintiff, and upon her acknowledging her signature thereto, was offered in evidence by the defendant. By this paper she is made to say: "When the car was slowing down I stepped on the foot-board of the car and fell to the ground. The car did not start while I was getting off, and I do not think that the motorman or conductor were guilty of negligence, and I hereby exonerate them from all blame."

The daughter, in her account of the facts attending the occurrence of the accident, gave substantially the same evidence as that given by her mother, according to the statement in the bill of exception. On cross-examination she is very explicit in stating that the car had come to a stop before she got off, and that she got off before her mother attempted to get off, and that it was while her mother was in the act of getting off that the car made a sudden jerk or start.

The evidence produced on the part of the defendant tended to show that there was no fault or negligence on its part that caused the accident; but that the plaintiff attempted to alight from the car before it had come to a stop and while it was in running motion, and in that way was thrown down from the running board and injured. To establish this defense several witnesses were examined, all more or less connected with the defendant company. Some of these witnesses contradicted the fact testified to by the plaintiff and her daughter, that the plaintiff did not attempt to alight from the car until it had come to a stop, and that it was by a sudden start or jerk that the plaintiff was thrown from the running board. The conductor and motorman both deny that the daughter preceded the mother in getting off the car, but they all concur in testifying that the latter was thrown or fell from the car and was seriously injured. The daughter in her testimony states, that when she got off the car her mother was just rising from her seat to get off; that after the car stopped, she, the witness, got off and went up towards the front of the car to get the basket from the motorman, and just as she was about to take the basket from the

motorman, she heard her mother scream, and turning to look she saw her mother thrown down beside the car. She says, as the motorman let go the lever and took up the basket with both hands to hand it out to her, the car gave a sudden jerk or start, and it was then that her mother was thrown off. This statement is contradicted by the motorman; and which of the two statements is most reliable was a question for the jury alone to decide.

The plaintiff was a passenger on the defendant's car, and, as such, was entitled to the highest degree of care and caution on the part of the carrier for her protection against injury. It is true, to make out a *prima facie* case, the burden of proof of negligence on the part of the defendant, as the cause of the injury, was upon the plaintiff, but this burden is changed, in the case of a passenger, by showing that the accident occurred that caused the injury to the plaintiff, while the latter was a passenger. The burden of proof is then cast upon the defendant to explain the cause of the accident, and to show, if that be the defense, that the plaintiff was negligent and that her negligence caused, or contributed to the production of, the injury. Inland and Seaboard Coasting Co. *v.* Tolson, 139 U. S. 557. The happening of an accident to a passenger while on or getting off a vehicle, under the control of the carrier, and which, in the usual and ordinary course of things, would not happen with proper care, casts the burden upon the defendant of explaining the circumstances of the accident so as to relieve itself from liability. This burden upon the defendant is sufficiently discharged, however, by showing that the injury complained of was caused by the plaintiff's own negligence or want of care. Dougherty *v.* Mo. R. R. Co., 81 Mo. 325; Murphy *v.* St. L. & S. R'y Co., 43 Mo. App. 343; Murphy *v.* C. I. & B. R. R. Co., 36 Hun, 199; Consol. Traction Co. *v.* Thalheimer, 59 N. J. L. 474. There are many cases to the same effect.

These questions of the burden of proof and the presumptions resulting therefrom, have been very fully and clearly considered by the Supreme Court of the United States in several cases, the last of which being the case of Gleeson *v.* Va. Midland Railroad Co., 140 U. S. 435;—a case taken up from this District. That was a case where the plaintiff occupied the position of a passenger, and was injured by reason of an obstruction on the road, caused by a landslide, and the defense was that the cause of the injury was the act of God, and not that of the defendant. But the defense did not prevail. In the opinion of the court, delivered by Mr. Justice Lamar, it is said: "Since the decisions in Stokes *v.* Saltonstall, 13 Pet. 181, and Railroad Co. *v.* Pollard, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general

acceptance; and was followed at the present term in Inland and Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551."

In another part of the same opinion, the court said: "The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

In view of these well settled principles of evidence and the presumptions of facts resulting therefrom, applicable in cases like the present, and the facts shown in proof on the part of the plaintiff, we think the court below was clearly right in refusing the application of the defendant to take the case from the jury. Indeed, the court below, without assuming to itself the right to pass upon the credibility of witnesses, and drawing conclusions of fact from conflicting testimony, could not have done otherwise than submit the case to the jury. The testimony made a case essentially proper for the jury to pass upon and not the court for final determination. It appears from the bill of exceptions that there were two prayers for instruction granted on the part of the plaintiff and six at the instance of the defendant, but those instructions are not incorporated in the bill of exceptions; but we may well assume that the case was fully and fairly presented to *to* the jury. The last or eighth of the defendant's prayers, which was rejected, was calculated to mislead the jury, and was therefore properly refused. What a judge might or should do on motion for a new trial in a case like the present, is quite a different question, but one with which we have nothing to do.

Nor was the statement procured from the plaintiff by the claim agent, Hoover, on the morning after the accident, whilst the plaintiff was suffering severe pain from the injury that she had received, at all conclusive of the fact that the motorman of the car was without fault or blame in causing her injury. The statement signed by her was written out by the agent of the defendant from his stenographic notes, taken from what he says was the substance of the statement or admissions of the plaintiff made to him, upon questions propounded to her. But she swears that she never intended, by anything that she said to the agent, to exculpate the motorman from blame; but that she told the agent that the motorman was to blame for the accident. A question very similar to the present was presented in the case, already referred to, of Inland and Seaboard Coasting Co. *vs.* Tolson; and there it was held that the statement or alleged admission made by the plaintiff the day of or the morning

after the accident, taking all the blame of the accident upon himself, was to be considered by the jury in connection with the circumstances under which the alleged admission was made. And so we think it was proper to be done in this case, and as was done in the trial below. See case of Railway Co. *vs.* Cruit, 30 Wash. Law Reporter, 776, decided at the present term of this court.

There is another question presented on an exception taken by the defendant, as to the right of the plaintiff to have produced by the claim agent when the latter was being cross-examined as a witness, the original notes taken by the agent upon the interview or examination of the plaintiff the morning after the accident, and from which the statement given in evidence was written out by the agent. The purpose of requiring such notes was to show that the statement read in evidence did not contain a full and accurate statement as made by the plaintiff at the time; the notes being required for purposes of cross-examination of the witness. The signed statement and the notes had both been referred to by the witness in his testimony, and, upon application to the court, he was required to produce his stenographic notes from which, he says, he wrote out the statement signed by the plaintiff. In thus requiring the notes to be produced for cross-examination thereon, we think clearly there was no error. It was the right of the plaintiff to probe the witness as to the accuracy of the statement written out from the stenographic notes taken by him, and this could best be done by producing the notes themselves, and comparing them with the signed statement. 1 Greenl. Ev. secs. 463–467.

There was a question of variance raised in the court below, and an exception taken to the ruling thereon, but there has been no error assigned in respect to such ruling, and we do not understand that the exception is relied upon here. We perceive nothing in the record that could sustain such exception.

Upon the whole, we find no error in the judgment below, and it must therefore be affirmed.

Judgment affirmed.

TUESDAY, *December 2d, A. D.* 1902.

CITY AND SUBURBAN RAILWAY OF Washington, Appellant, *vs.* HEDWIG E. SVEDBORG. } No. 1210, October Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

In the Court of Appeals of the District of Columbia.

THE CITY AND SUBURBAN RAILWAY COMPANY OF WASHINGTON
vs.
HEDWIG E. SVEDBORG. } No. 1210.

And now comes the said, The City and Surburban Railway Company of Washington, and moves the court to allow a writ of error from the Supreme Court of the United States to this court to review the judgment passed herein on the 2nd day of December, 1902, and to fix the amount of the bond to be given by the plaintiff in error for costs.

C. C. COLE,
J. J. DARLINGTON,
Attorneys for the Plaintiff in Error.

Writ of error allowed as prayed in the foregoing motion and the penalty of the bond for costs is fixed at three hundred dollars, not, however, to operate as a supersedeas.

M. F. MORRIS,
Associate Justice.

(Endorsed:) No. 1210. City and Suburban Railway of Washington, *vs.* Hedwig E. Svedborg. Motion for writ of error and order allowing same. Court of Appeals, District of Columbia. Filed Dec. 16, 1902. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between City and Suburban Railway of Washington, appellant and Hedwig E. Svedborg, appellee a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of December, in the year of our Lord one thousand nine hundred and two.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, The City and Suburban Railway of Washington, as principal, and George H. Harries, as surety, are held and firmly bound unto Hedwig E. Svedborg in the full and just sum of three hundred dollars to be paid to the said Hedwig E. Svedborg, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of January, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between The City and Suburban Railway of Washington and Hedwig E. Svedborg a judgment was rendered against the said The City and Suburban Railway of Washington and the said The City and Suburban Railway of Washington having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Hedwig E. Svedborg citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said The City and Suburban Railway of Washington shall prosecute said writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY AND SUBURBAN RAILWAY OF WASHINGTON, [SEAL.]
By ALLAN L. McDERMOTT, *Pres't.* [SEAL.]
GEO. H. HARRIES. [SEAL.]

Sealed and delivered in the presence of—
JAS. B. LUCKEY.

This bond is satisfactory
PHILIP WALKER,
Att'y for Appellee.

Approved by—
M. F. MORRIS,
Associate Justice, Court of Appeals of the District of Columbia.

[Endorsed:] No. 1210. City and Suburban Railway of Washington, appellant *vs.* Hedwig E. Svedborg. Bond on writ of error to Sup. Court, U. S. Court of Appeals District of Columbia Filed Jan. 13, 1902 Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Hedwig E. Svedborg, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein City and Suburban Railway of Washington is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 13th day of January, in the year of our Lord one thousand nine hundred and three.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted January 16, 1903.

PHILIP WALKER,
For Defendant in Error.

Court of Appeals, District of Columbia. Filed Jan. 22 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 38 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of City and Suburban Railway of Washington, appellant, *vs.* Hedwig E. Svedborg, No. 1210, January term, 1903, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of January, A. D. 1903.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,830. District of Columbia Court of Appeals. Term No. 214. City and Suburban Railway of Washington, plaintiff in error, *vs.* Hedwig E. Svedborg. Filed February 11", 1903.

FILE COPY.

FILED
APR 2 1904

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 214.

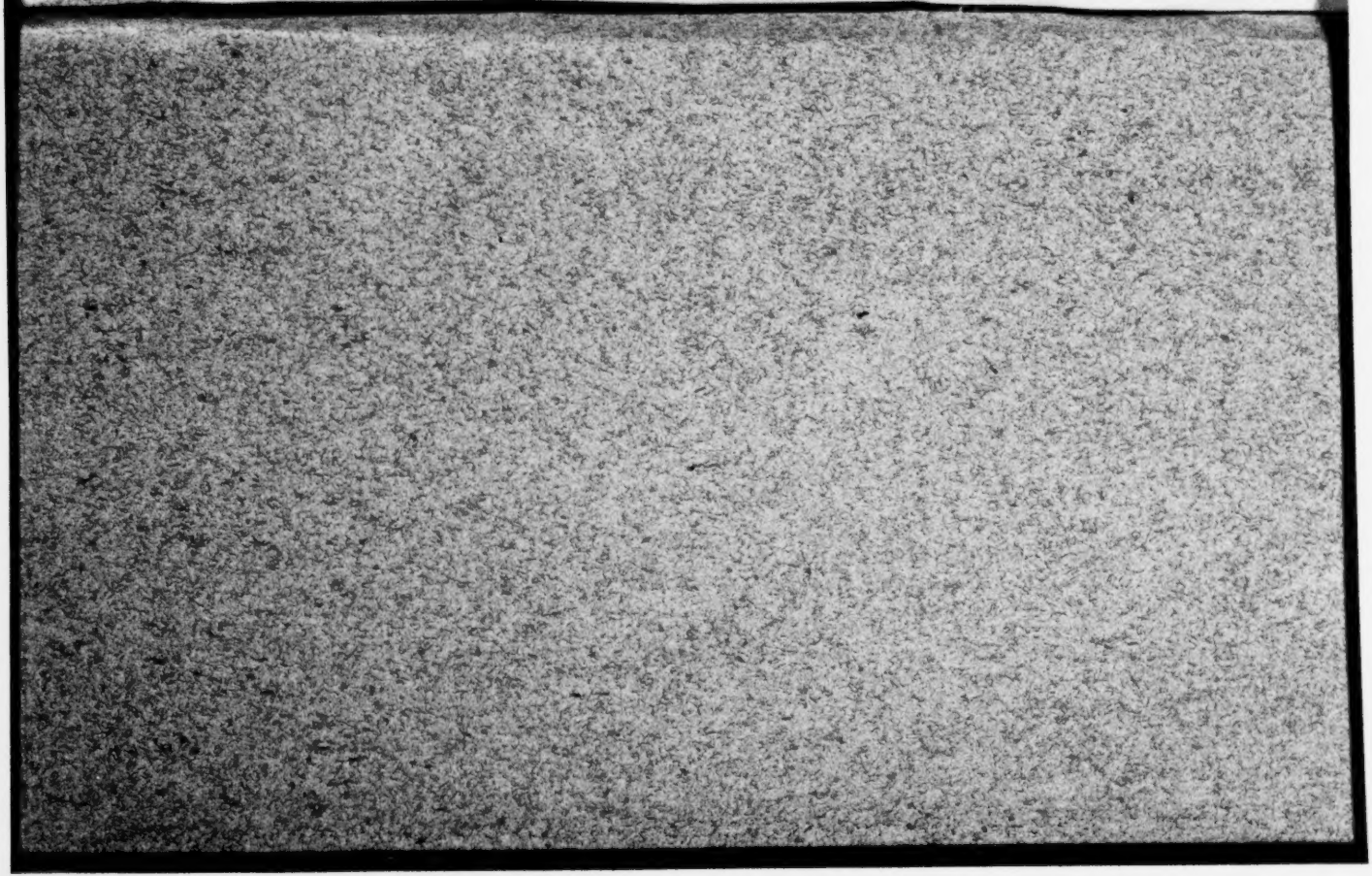
THE CITY AND SUBURBAN RAILWAY COMPANY, OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

HEDWIG E. SVEDBORG, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

J. J. DARLINGTON,
C. C. COLE,
R. B. BEHREND,
Attorneys for Plaintiff in Error.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 214.

THE CITY AND SUBURBAN RAILWAY COMPANY, OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

HEDWIG E. SVEDBORG, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error to the Court of Appeals of the District of Columbia. The action was for damages for an injury to the person of the plaintiff, caused while alighting from one of the cars of the plaintiff in error, whereby she suffered a fracture of the femur. At the time of the accident, the car was bound east in C street, near the intersection of Eleventh street northeast. The declaration alleges that the car stopped for her to alight, at the point above mentioned, and that, while she was alighting, the car was suddenly started by the negligence of defendant, and she was thrown to the ground and injured (Rec. p. 2).

The only evidence on behalf of the plaintiff as to the circumstances of the accident was the testimony of herself and young daughter. At the close of the plaintiff's evidence, the counsel for the defendant moved the court to direct a verdict for defendant, which the court refused, and the defend-

ant excepted (Rec. p. 16). At the close of all the evidence on both sides, the same motion was renewed and again overruled, and defendant excepted (Rec. p. 25).

During the examination of one of defendant's witnesses, counsel for defendant referred to a memorandum made by said witness of an interview between him and plaintiff in relation to the accident. On cross-examination counsel for plaintiff demanded to be shown the memorandum, and the court ruled that he was entitled to have it for the purpose of cross-examination, and counsel for defendant excepted (Rec. p. 18).

Plaintiff testified at the trial that the conductor was not to blame for the accident, but she thought the motorman was, and there was absolutely no evidence tending to show any fault whatever on the part of the conductor. After the evidence was closed, the counsel for defendant requested the court to instruct the jury that unless they found from the evidence that there was negligence on the part of the motorman, their verdict should be for the defendant, but the court declined to so instruct, but, on the contrary, left it to the jury to determine whether there was negligence on the part of the conductor, and to this ruling of the court the counsel for the defendant excepted (Rec. pp. 25–26).

There was a verdict and judgment for the plaintiff in the trial court (the Supreme Court of the District of Columbia) for $6,500, from which the defendant in the trial court, the plaintiff in error here, appealed to the Court of Appeals of the District of Columbia, which affirmed the judgment of the trial court, and the case was removed here by writ of error. The Court of Appeals, in overruling the point of the plaintiff in error that the trial court should have taken the case from the jury on the whole evidence, applied the rule of *res ipsa loquitur*, and held that, inasmuch as the defendant in error was a passenger at the time of the accident, the proof of the injury to her was alone sufficient to raise the presumption of negligence on the part of the defendant in

error, and that it was a question for the jury whether that presumption was rebutted.

Assignment of Errors.

The court below erred:

First. In affirming the ruling of the trial court in refusing to instruct the jury to return a verdict for the plaintiff in error.

Second. In applying the rule of *res ipsa loquitur* to the case in determining the point mentioned in the first assignment of error.

Third. In affirming the ruling of the trial court in refusing to instruct the jury as prayed by the counsel for plaintiff in error.

Fourth. In affirming the judgment of the trial court.

ARGUMENT.

First.

The court should have instructed the jury to return a verdict for the defendant on the whole evidence. There was no evidence tending to show negligence on the part of the defendant sufficient to justify the submission of that question to the jury. The only evidence tending to show negligence was given by the plaintiff herself and her young daughter. The plaintiff herself upon that point testified as follows:

> "That the car stopped at Eleventh and C streets—on the west side thereof—and her daughter alighted; that while her daughter was walking up towards the front of the car, to procure the basket from the motorman, she attempted to alight, when the car jerked forward and threw her to the ground" . . . (Rec. pp. 4 and 5).

"On cross-examination this witness testified that the only person in the car besides herself and daughter, when they reached Eleventh street, was a gentleman, who occupied the same seat that plaintiff did, namely, the first seat on the north side of the car, in the open part thereof, the seats in the open part running crosswise of the car and consisting of two tiers, one on the south and one on the north side thereof, with an aisle between; that, when she left the seat to alight the gentleman was still sitting in it; that he did not get off the car before she did; that the car was standing when she arose to get off; that she kept her seat until the car stopped, and got up as soon as it stopped; that she stepped on the running board and looked towards the motorman to see if he handed the basket to her daughter; that as soon as her daughter reached to get the basket the car gave a jerk and she was thrown on her knees; that she is not positive whether the car started or gave a jerk; that she was on the running board one second when the car started or jerked; that her daughter got off the car at the side before witness, and had gotten up to the motorman before the car started; that she saw the motorman pick up the basket and hand it to her daughter when she was thrown; that the conductor was standing at the rear end counting fares; that she heard no bell for the car to start; that she got off on the running board in front of the first seat; *that the car was standing still and the motorman was standing to the right of the platform, with the basket in both hands, in the act of handing it to her daughter, when the car jerked; that the motorman put the basket down and came running to her assistance;* . . . that she thought the motorman was to blame, because she did not hear the conductor give the signal for the car to start, and she always thought the motorman was to blame for not stopping the car properly, or for starting the car in handing the basket over, and that the motorman could have started the car by kicking or unloosening the brake with his foot" . . . (see Rec. pp. 5 and 6).

The foregoing is all of the testimony of the plaintiff her-

self touching the question of negligence or how the accident occurred. The only other evidence upon that point is that of her daughter, Olga, a young girl. She testified as follows:

After testifying on her direct examination that after the car stopped she got off and went up towards the front of the car to get the basket from the motorman, she testified as follows:

"By Mr. LIPSCOMB:

Q. Where was your mother when you got off the car? A. When I got off the car she was just rising, ready to get off.

Q. And what did you say, if anything, to the motorman? A. I don't remember saying anything to him.

Q. What did you do at that time, and what did he do? A. *He handed the basket over. I didn't take it, though; but he handed it over with both hands.*

Q. *He handed it over?* A. *Yes, sir.*

Q. *Why did you not take it?* A. *Because I heard my mother scream, and I turned back to go to her.*

Q. You heard your mother scream? A. Yes, sir.

Q. Where was your mother when you turned to go to her? A. She was thrown beside the car.

Q. What had caused her to be thrown beside the car? A. *When the motorman handed the basket over with both hands it caused a jerk.*

Q. A jerk of what, Miss Olga? A. *Jerk of a car.*"

On cross-examination this witness testified as follows:

"By MR. COLE:

. . . . . .

Q. You do not remember whether you asked him for the basket or not? A. No, sir.

Q. But he did hand it out to you? A. Yes, sir.

Q. *And you say he held it in both hands—he used both hands in handing it out?* A. *Yes, sir.*

Q. *Do you feel quite positive of that?* A. *Yes, sir.*

Q. *How do you remember now that he handed it out with both hands rather than one?* A. *Because the basket was rather heavy. It required two hands to hand it over.*

Q. And the conductor handed the basket out to you with both hands? A. The motorman handed it out.

Q. I beg your pardon; I mean the motorman. Was it where you could have taken hold of it if you had not been prevented from doing so by hearing your mother scream or hearing that she had fallen? I mean to ask whether he had gotten the basket near enough to you so that you could have taken it if you had not been prevented by your mother's falling?

(The witness did not answer.)

Q. Do you understand what I mean? A. *Yes, sir; I believe I could have taken it.*

Q. You could have taken it? You could have reached it from where you stood and where the motorman stood handing it to you? You could have reached it if you had not been prevented from doing so by your mother's falling?

A. *No, sir; he handed it right over the fender. He had to put it over farther before I could reach it.*

Q. You say he would have had to put it over farther before you could have reached it? A. Yes, sir.

Q. Which side of the car was he on when he handed you the basket? A. *He was on the right-hand side.*

Q. *That was on the side you were on, of course?* A. *Yes, sir.*

Q. *And was he right at the side of the car—right at the side of the platform?* A. *Yes, sir.*

Q. Had he passed the basket out over the railing, over the dashboard or the gate, or whatever you call it? A. *No, sir; I think it was leaning on the gate. He had not lifted it over.*

Q. It was leaning on the gate? A. Yes, sir.

Q. *He had set it up on the gate?* A. *Yes, sir.*

Q. And that was the position it was in when the car started forward and your mother fell, and that diverted your attention, and you went back to your mother without taking the basket? A. *Yes, sir.*

Q. That is the way it occurred, is it? A. *Yes, sir.*

Q. That is your recollection about it now? I say, do you remember distinctly now that it did occur that way? A. Yes, sir.

Q. Do you know what caused the car to start forward or jerk at that time? How did it happen? What made the car jerk and start forward? A. The motorman had the basket with two hands, and I suppose that caused the jerk. He had two hands on the basket.

Q. He had both hands on the basket? A. Yes, sir.

Q. And you suppose that is the reason why the car jerked? A. Yes, sir.

Q. You saw no other cause for its jerking, except that he had both hands on the basket? A. When he picked the basket up he took two hands.

Q. Yes; and both hands were on the basket when the car jerked, were they? A. He was just about to pick the basket up with both hands when the jerk occurred.

Q. How is that? A. The jerk occurred when he put both hands on the basket.

Q. The car jerked when he put both hands on the basket; is that it? A. Yes, sir.

Q. I thought you said a moment ago that the car jerked when he was standing holding the basket on the railing for you to take. A. The jerk occurred when he let go of the lever to take both hands to put on the basket.

Q. Then the car jerked before he picked the basket up, did it? A. It jerked just as soon as he let go of the lever and put both hands on the basket.

Q. Did you see his hands when he let go of the lever? A. No, sir; I saw his two hands on the basket.

Q. Where was the basket when you first saw his two hands on it? A. He was lifting it to hand it to me over the gate.

Q. He was lifting it up to hand to you over the gate. Now, had the car jerked at that time, or did it jerk after that time? A. It jerked before.

Q. It jerked before that time? A. It jerked when he let go of the lever—when he put both hands on the basket.

Q. The car jerked when he let go of the lever to get the basket for you; that is true, is it? A. I don't quite understand.

Q. Why, I understand you to say now that the car jerked when the motorman let go of the lever to get you the basket. A. Yes, sir.

Q. Then you were mistaken a little while ago, or did not mean to say a little while ago, that the car jerked as he was about to pass the basket out to you? A. It jerked when he let go of the lever to hand the basket out (see Rec. pp. 8, 9, 10)."

The evidence on behalf of the defendant as to how the accident happened was as follows:

> "Walter Waters testified that he was the conductor on the train from which plaintiff had her accident, being employed at the present time with a railroad company in Pittsburg; that he signaled the motorman to stop at 11th and C streets; that just before the car came to a stop the lady walked off; that the car went from 2 to 2½ feet after plaintiff got off; that the gentleman who was on the car got off of the car before plaintiff did; that when the plaintiff got off, her daughter was in the aisle of the car, walking towards the running board of the car; that the car stopped only once at 11th and C streets, plaintiff jumping off before the car came to a stop; that the gentleman who was on the car (Meade) got off

while the car was in motion; the little girl did not get off while the car was so moving; that just before the car stopped witness gave three bells, because he saw plaintiff was going off and wanted car to stop as soon as possible.

"On cross-examination, this witness testified that the cars were on time, and that other cars came up while his car was standing there; that he did not ring three bells when the gentleman (Meade) alighted, because men jump off often—not ladies; that he was on the rear end of the car when he gave the bell, and did not come up front until the lady jumped off.

"On redirect examination he testified that the car stopped about twelve minutes; that he helped to pick the plaintiff up with the assistance of the gentleman (Meade).

"On recross-examination he testified that he never saw the basket of eggs." (Rec. pp. 20 and 21.)

"A. H. Hunt testified that he was the motorman of the car, having been a motorman ever since the electric cars have been on the line; that he got a bell at 10th and C streets to stop at 11th street; that just before car stopped he heard the conductor call to the lady to wait until the car stops; that he got off of the car to see what was the matter, and they had the plaintiff on her feet; that the car moved about 4 feet after receiving the three bells; that he was just coming to a stop; that cars did not come right up behind witness' car while he was waiting there; that he does not remember anything about the basket of eggs; that he put on the brakes as hard as he could and threw off the current, throwing the current off first; that the car can not be stopped without throwing the current off; that the car can not start, after it has stopped, without putting on current; that the car can not be jerked without putting current on; that there can not be a jerk after brake is off, unless there is a hill; that it is level at the point of accident; that the car would not start with current off; that the car stopped once at the corner; that when the car stopped plaintiff was in the street; that the

current is governed by the controller, which is on the left-hand side of the front of the car, and that the current can not be put on except through the use of the controller; that when standing by the gate on the right side of the car he can not reach the controller; that the brake is not operated with his feet; that a dog holds the brake after his hands are off, and that in order to release the brake the dog is removed from the ratchet on the brake-rod.

"On cross-examination he testified that he heard the conductor call to the lady; that he saw the little girl; that he did not hand her any basket and did not remember her having a basket of anything; that he heard no scream; that the car could not move forward if the brake is taken off after it has stopped, if there is no grade; that the brake can be taken off at the place of the accident, and the car won't move" (Rec. pp. 21 and 22).

"Albert R. Meade testified that he was on the car from which plaintiff had her accident, boarding it at the corner of 9th and G streets, N. W., the plaintiff boarding the car when it reached 7th and G, N. W., taking a seat beside witness; that just before the car reached its stopping place at 11th and C streets N. E. witness left his seat and alighted therefrom while the car was still in motion; that he left the seat before the plaintiff did; that just after he alighted from the car he heard a noise, and, looking around, saw the plaintiff in the rear of him on the ground; that at that time the car had not quite come to a stop, but stopped a few seconds afterwards; that he did not see the plaintiff's daughter before the accident, but afterwards; that he helped plaintiff up and gave his name to the conductor.

"On cross-examination he testified that he was one-half of a foot from the car when the plaintiff fell; that he alighted from the car before the plaintiff; that he saw the plaintiff on the street before the car had stopped; that he did not see plaintiff's daughter leave the car, and does not recollect having seen the basket" (Rec. pp. 22 and 23).

"H. B. Mathiot testified that he was a motorman in the employ of the defendant company, having been such for six years; that at the time of the accident the car on which he was motorman was about one-half a square in the rear of the car from which plaintiff had her accident; that he saw the witness Meade jump off of the car and start towards the pavement, and next saw plaintiff falling on the street; that just as the plaintiff fell he heard the conductor give three bells, when the witness Meade turned towards the plaintiff; that the car had not stopped before the plaintiff fell; that there is nothing on the platform of the car by which it can be started with the foot; that the grade at 11th and C streets is pretty near level.

"On cross-examination this witness testified that he was not a witness at the last trial; that the company did not know of him as a witness, and only found him out the night before; that he heard the case had started and spoke of it to George Tyser, another motorman who was on his car, and told him (Tyser) that he saw it; that this morning, when he asked to get off for the day, the clerk at the office told him that he was wanted at court, and sent him to Judge Cole's office. He further testified that the cars were all behind time that evening; that plaintiff's daughter Olga got off of the car after the accident; that the witness Meade had reached the curbstone when plaintiff got off; that he supposes the distance between the curbstone and the track is twenty feet; that the car moved about two feet while Meade was walking the distance of twenty.

"On redirect examination this witness testified that the car stopped but once at that point, and when it did stop the plaintiff was on the ground" (Rec. p. 24).

"Charles Fernald, a civil engineer in the employ of the District, who fixed the grade of the tracks, testified that the grade from Tenth to Eleventh streets is eight inches in one hundred feet, the descent being from Eleventh towards Tenth street;

that the grade between Eleventh and Twelfth streets northeast is six inches in one hundred feet, the descent being from Eleventh towards Twelfth street; that any grade less than two per cent is considered a flat grade; that the track across Twelfth street is substantially level" (Rec. p. 25).

"Robert E. Lee testified that he was the general superintendent of the defendant company; that the only means of applying the current to start the car was by a controller on the front of the car; that when the car is stopped by applying the brake the dog, which holds the brake, can not be released by a kick of the foot without first putting pressure on the brake-handle, when the dog can be kicked out of the ratchet. He further testified that if the controller had been turned off except one point and the brake put on, but the dog not put in use, on removing the motorman's hand from the crank the car would start" (Rec. p. 25).

"William Were and George B. Tyser testified that they were motormen in the employ of the defendant company; that they made experiments with the car from which plaintiff had her accident; that they ran the car to 11th and C streets northeast, threw the current off, applied the brakes, and, when the car stopped, threw the brakes off quickly in order to see if the car would start forward; that the car did not start forward at either trial; that the car was stopped on the west side of 11th street; that they then set the brakes, put the controller on five points to see if the car would move with the brake and the current on, and it did not; that it is impossible to kick the dog out of the ratchet without first taking hold of the brake and putting pressure upon it" (Rec. p. 25).

It will be seen from the foregoing testimony that the plaintiff testifies that the car had stopped still, and that while she was standing on the running-board, about to step off, she observed the motorman standing on the right-hand

side of the platform passing the basket out to her daughter with both hands, and that he was in that position when she says the car started forward, or jerked, and threw her. It is absolutely impossible that the accident could have occurred in that way. There is no way in which the car could have been started with the motorman in that position. The plaintiff's own testimony showed conclusively that there was no negligence on the part of the conductor. It will also be observed that the young daughter, on her direct examination, testified in that regard, as to the position of the motorman, precisely as her mother did; and on cross-examination reiterated her testimony given in chief, but subsequently changed it, and said that the car started when the motorman let go of the lever to take up the basket. That was the state of the evidence when the plaintiff's case closed. It is submitted that that was insufficient evidence to submit to the jury on the question of negligence. The daughter had testified both ways upon that subject. Her testimony was too vague, uncertain, and unreliable to be submitted to a jury at all. The only evidence that can be said to have the slightest tendency to prove negligence is that of the daughter, given after she had twice testified, showing that there was no negligence on the part of the motorman. Whether she gave the latter evidence from want of recollection or intentionally is immaterial. Where the only evidence tending to show negligence comes from a witness who testifies positively both ways as to the same identical fact, it is mere matter of speculation as to whether the witness is correct in any of her testimony, and it is rendered perfectly worthless for any purpose and ought not to have been submitted to the jury.

In the case of Peaslee *vs.* Glass, 61 Ill., 94, one of the questions was whether the plaintiff was corroborated. Upon that point the court said :

> "The only evidence to charge Peaslee is that of the plaintiff, who swears that in a conversation in

which he was complaining to Peaslee, the latter admitted the water had been turned off by his direction. We say the only evidence, because the young man in the employ of Glass, who testified to a conversation had by him with Peaslee, testifies both that Peaslee did and did not admit this and no weight can be attached to his testimony on this point."

The evidence on behalf of the defendant had no tendency to strengthen the plaintiff's case, but showed conclusively how the accident did happen and that it was without negligence on the part of the defendant, but through the negligence of the plaintiff. Not only the motorman and conductor of the car on which plaintiff was riding immediately before she was injured, but also a man who was riding on the car and got off at the same time as plaintiff did, as well as the motorman of the car following the one plaintiff was on, who was near enough to observe, concur in their testimony that the plaintiff stepped off the car before it stopped and was thereby thrown to the ground. It was also proved conclusively on behalf of the defendant that the street where the accident happened was level, and that a car would not start by throwing the brake off unless the current was on. The motorman also testified that he turned the current off before he put the brake on to stop the car, and that the dog was fixed and fastened to the brake. It is true that one of defendant's witnesses said that if the current had not been turned off and the brake had been put on and the car stopped, and the dog not put in use to hold the brake, when the motorman let go of the brake the car would have started, and this is the theory that the plaintiff was finally compelled to adopt.

But there was no evidence tending to prove any of these facts. It is true that the plaintiff's daughter testified that when the motorman removed his hand from the lever of the brake the car started. If that were the fact it might give some color of plausibility to the plaintiff's final theory. Her case depends upon whether the whole evidence

would support such a finding by the jury. It is submitted that it would not. The little girl had twice before testified, as her mother did, that the car started when the motorman was standing on the right side of the car holding the basket on or out over the rail with both hands. Clearly it would have been impossible for the car to have started or jerked with the motorman in that position. If the current was on and the dog not fixed it would have started the moment his hand left the lever. If the plaintiff's testimony be correct it did not start at that time. If the testimony first given by the daughter on direct examination and repeated on cross-examination be true, it did not. The plaintiff testified that when the car started or jerked and she fell, "the motorman put the basket down and came running to her assistance" (Rec. p. 6). Neither the plaintiff nor her daughter testified that he stopped to turn the current off and fix the brake. Had the car started and had the motorman left his post, as the plaintiff testified, the car would have gone on, which no one contends is the fact. It can hardly be said that there was even a *scintilla* of evidence tending to prove that the current was on and the dog not fixed and that the car started when the motorman removed his hand from the brakes. The evidence on behalf of the defendant proves clearly that the accident happened by the plaintiff's leaving the car while it was in motion. When the evidence for the plaintiff and defendant is all considered together it is wholly insufficient to support a verdict for the plaintiff. It does not support the conclusion that she was thrown from the car by a starting or jerking of it, and the court should so have instructed the jury.

Pleasants *vs.* Fant, 22 Wall. 116.
The Commissioners, etc., *vs.* Clark, 94 U. S. 278.
Randall *vs.* The B. & O. R. R. Co. 109 U. S. 478.
B. & O. R. R. Co. *vs.* St., use, etc., 71 Md. 590.
Duvall *vs.* B. & O. R. R. Co., 73 Md. 513.
P. W. & B. R. R. Co. *vs.* Burkhardt, 83 Md. 516.
Patton *vs.* Texas & Pac. R. R. Co., 179 U. S. 658.

In the 94th U. S., Mr. Justice Clifford, speaking on the point under consideration, said:

> "Matters of fact are involved in the exception to the second instruction. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence is of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence (Ryder *vs.* Wombwell, Law Rep., 4 Exch. 39).
>
> "Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a cause, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In the case of Randall *vs.* The B. & O. R. R. Co., *supra*, there was some evidence tending to show negligence on the part of the defendant. In the statement of the case by the reporter the evidence is recited as follows:

> "A single witness, who had been a brakeman, called for the plaintiff, in answer to a question, often repeated, of his counsel, whether there was a safe and proper switch to be used at that point, testified that he could not say it was a very safe place at that time there; that he thought that was not a proper kind of switch, and an upright switch would have been more convenient to handle; that he did not think it was a very safe ball there; that he thought it was not a safe ball there; and that it could not be unlocked without danger while an engine or train was coming upon the other track."

Referring to this slight evidence, Mr. Justice Gray, in delivering the opinion of the court, uses this language:

"It is the settled law of this court, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant (Pleasant *vs.* Fant, 22 Wal. 116; Herbert *vs.* Butler, 97 U. S. 319; Bowditch *vs.* Boston, 101 U. S. 16; Grigg *vs.* Houston, 104 U. S. 553). And it has been recently decided by the House of Lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it was for the jury to say whether from those facts, when submitted to them, negligence could be inferred (Metropolitan Railway Co. *vs.* Jackson, 3 App. Cas. 193).

"Tried by this test, there was no sufficient evidence of any negligence on the part of the railway company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight."

The negligence claimed to exist in this case is that the motorman stopped the car by the brake without turning off the current fully; that the dog was not fixed so as to hold the brake in place, and that when he let go the brake to take up the basket, the current still being on, the brake loosened and the car started. The only evidence in any degree tending to establish any of those facts is that of the plaintiff's little daughter, who, after concurring with her mother in testifying to a statement of facts wholly inconsistent with such theory, stated that the car started when the brakeman's hand left the lever to take up the basket. Can it be said that her evidence under the circumstances is sufficient to be submitted to the jury to establish these facts?

In the case of Pleasants *vs.* Fant, 22 Wal. 116, there was evidence tending to show admissions of the defendant that he was to share in the profits of the firm of Keene & Co.

for a debt of which he was sued, but it was slight and insufficient to establish the fact in the mind of a reasonable man. Responding to the argument that, because there was some evidence, however slight, the cause should have been submitted to the jury, the court said:

> "But, as was said by this court in the case of Improvement Company *vs.* Munson, recent decisions of high authority have established a more reasonable rule that, in every case, before the evidence is submitted to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.
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> . . . . . .
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> "It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper on these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.
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> "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor."

In the case of the B. & O. R. R. Co. *vs.* The State, use, etc., 71 Md., a boy was run over and killed by an engine. There was some slight evidence tending to show that there might have been negligence on the part of the engineer.

The court, in reversing the judgment of the court below, and holding that the case should not have been submitted to the jury, uses the following language:

"In matters of proof we are not justified in inferring from mere possibilities the existence of facts. There must be proof of the essential facts to fix liabilities of the party charged with the commission of a wrongful act, and even a *scintilla* of evidence or a mere surmise that there may have been negligence on the part of the defendant will not justify the court in submitting the case to the jury. There must be in a case like the present some reasonable evidence of well-defined acts of negligence as the cause of the injury complained of; and, therefore, it is incumbent upon the plaintiff to give some affirmative evidence of the existence of such negligence before he can ask that the case be submitted to the jury.

. . . . . .

"Juries can not be allowed, however great the deference conceded to their province, to make mere conjecture or speculation the foundation of their verdicts. If there be no evidence upon which a rational conclusion may be based in support of the claim of the plaintiff, the case should be withdrawn from the jury; and to do this is a preliminary duty of the court.

"It has, however, been argued in support of the case of the plaintiff, that it was competent to the jury to accept and act upon such parts of the testimony of the witnesses for the defendant as they deemed proper, and to reject such other parts as they deemed unworthy of credit; and by so doing they might well have found that there was negligence on the part of the defendant. But there was really no conflict of evidence in the case, and nothing to disparage or discredit the testimony of any witness examined. But conceding the right of the jury thus to deal with the testimony of an unimpeached witness, before they could find a fact opposed to or in conflict with the testimony so rejected by them they should have legal and competent evidence before them upon which to base their finding. The jury may refuse to give credit to the statement of a witness, but they are not at liberty to infer from the rejected testimony alone, and because they do discredit it, a fact the very reverse of what has been sworn to by the wit-

> ness. Therefore, supposing the jury to have disbelieved the testimony of the witnesses for the defendant, or all such portions of it as tended to prove the non-existence of negligence on the part of the defendant, yet there is no portion of their testimony that tends to establish the existence of negligence, and consequently the case stands as it would have stood upon the testimony given on the part of the plaintiff alone; and that, as we have seen, wholly failed to make a case for the plaintiff."

In a later case above cited in 83d Md., where it is said in the opinion of the court that there was slight evidence tending to show negligence, the court used the following language:

> "But, as has been frequently held by this court, where there is no proof of negligence on the part of the defendant, or where the proof is so slight and inconclusive in its nature as to be calculated to lead the jury into wild speculation or an irrational conjecture—as it is in this case—then the duty of the court is to grant an instruction as to its legal insufficiency."

Where there is some evidence on behalf of the plaintiff which might sustain a verdict if it was uncontradicted, yet where the rebuttal is overwhelming, so that it may be said that taking all the evidence together the verdict would be unsupported by the evidence, it is the duty of the court to direct a verdict.

> Met. Railway Co. *vs.* Moore, 121 U. S. 569.
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> Powers *vs.* N. Y. Central, etc., R. R. Co., 60 Hun, 19, affirmed in 128 N. Y. 659, and authorities therein cited.

In the case in 121 U. S., the court states that the evidence may be insufficient to sustain a verdict either because it is insufficient in law or because it may be insufficient in fact. Upon this subject the court said:

"Strictly speaking, evidence is said to be insufficient in law only in those cases where there is a total absence of proof, either as to its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Such, for instance, would be the case where a fact was attested by one witness only, when the law required two; or when the alleged agreement was proven to be verbal, when the law required it to be in writing. In such cases, a verdict might be said to be against law, because founded on insufficient evidence. Insufficiency in point of fact may exist in cases where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it, and yet it may be met by counterveiling proof so potent as to leave no reasonable doubt of the opposing conclusion.

. . . . . .

"So upon the whole evidence in the case the testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet, in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. The obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence," citing Randall *vs.* B. & O. R. R. Co.

In the case of Powers *vs.* N. Y. C., etc., R. R. Co., *supra*, an employee was killed because of an alleged defective engine. There was some evidence of a defect, but controlling evidence rebutting it. The court said:

"We think the evidence failed to establish the omission of any duty by the defendant, which it

> owed to the plaintiff's intestate, which caused the injury complained of. We do not think the evidence was such as would have justified the jury in finding that the defendant had omitted to exercise reasonable care and prudence in furnishing appliances for the intestate's use or in keeping them in proper repair. That there was a mere theory from which a jury might have surmised that the defendant had omitted some duty it should have performed was not enough. If the proof of a fact is so preponderating that a verdict against it would be set aside by the court as contrary to the evidence, then it is the duty of the court to direct a verdict. It was said in Baulec *vs.* New York and Harlem R. R. Co., 59 N. Y. 356, 366, by Judge Allen, that 'it is not enough to authorize the submission of a question as one of fact to the jury that there is some evidence. A *scintilla* of evidence or a mere surmise that there may have been negligence on the part of the defendants would not justify the judge in leaving the case to the jury,' quoting from Williams, J., in Toomey *vs.* Railway Company, 3 C. B. (N. S.) 146. In Hyatt *vs.* Johnston, 91 Penn. St. 200, Justice Sterrett says: 'Since the *scintilla* doctrine has been exploded, both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence or a mere *scintilla*, but whether there is any that ought reasonably to justify the jury in finding that the fact sought to be proved is established.'"

In Patton *vs.* Texas & Pac. R. R. Co., 179 U. S. 658, where there was some evidence, though slight, tending to show that the plaintiff, an employee, was injured by a defective engine, this court reiterates the doctrine in the following language:

> "That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such inconclusive

character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it,' "

citing many of the court's former decisions upon this point.

Second.

The court below erred in holding that the doctrine of res ipsa loquitur applies to this case or can in any way affect the question of whether the case should be taken from the jury.

The theory upon which the court below seems to have proceeded was that the mere injury to the plaintiff, regardless of the manner in which it happened, raised a presumption of negligence against the defendant, and that thereupon the burden was shifted upon the defendant to show that the injury was not occasioned by its negligence, and as that raised a question of fact it was proper to submit the case to the jury. Upon that point the court below said in its opinion:

> "The plaintiff was a passenger on the defendant's car, and, as such, was entitled to the highest degree of care and caution on the part of the carrier for her protection against injury. It is true, to make out a prima facie case, the burden of proof of negligence on the part of the defendant, as the cause of the injury, was upon the plaintiff, but this burden is changed, in the case of a passenger, by showing that the accident occurred that caused the injury to the plaintiff, while the latter was a passenger. The burden of proof is then cast upon the defendant to explain the cause of the accident, and to show, if that be the defense, that the plaintiff was negligent and that her negligence caused, or contributed to the production of, the injury (Inland and Seaboard Coasting Co. *vs.* Tolson, 139 U. S. 557). The happening of an accident to a passenger while on or getting off a vehicle, under the control of the carrier, and which, in the usual and ordinary course of things, would not happen with proper care, casts the burden

> upon the defendant of explaining the circumstances of the accident so as to relieve itself from liability" (Rec. p. 31).

It is respectfully submitted that this is not an accurate statement of the rule. The presumption of negligence never arises from the mere happening of an accident or injury to a person, whether that person be a passenger or not. The presumption of negligence arises only when the agency causing the accident is under control of the defendant and the circumstances are such that it appears to a reasonable mind that such an accident does not ordinarily happen, except where it is preceded by negligence. Nor does the rule ever apply to a case where the defendant controverts the fact which raises the presumption. The presumption arises only upon the admission of the fact or the proof of it.

The cases in this court fully illustrate that doctrine.

In the case of Stokes *vs.* Saltonstall, 13 Pet. 181, it was held that the upsetting of the defendant's stage coach, whereby the plaintiff's wife was injured, raised the presumption of negligence against the defendant, but that presumption did not arise from the mere injury to the plaintiff's wife, but from the fact of the extraordinary occurrence of the upsetting of the stage coach, and that fact was not controverted by the defendant.

In the case of Transportation Company *vs.* Downer, 11 Wall. 129, this court states the rule in the following language:

> "A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."

In the case of Railroad Company *vs.* Pollard, 22 Wall. 341, the injury to Mrs. Pollard occurred by the car in which she was riding being bumped violently against another car, which threw her against a seat in the car in which she was standing at the time, and severely injured her. The court instructed the jury substantially that if they believed that there was an unusual violent bumping of the cars, which threw Mrs. Pollard against the seat, that would be prima facie evidence of negligence unless rebutted by proof on behalf of the defendant.

In the case of Inland and Seaboard Coasting Company *vs.* Tolson, 139 U. S. 557, the trial court instructed the jury substantially that if they should find from the evidence that the steamboat, which caused the injury, was thrown against the wharf with such force as to tear up some of the planks, that would be prima facie evidence of negligence on the part of those in control of the steamboat and that instruction was approved by this court. It is clear, however, from the language of the instruction, and of this court in approving it, that that presumption arose from the unusual occurrence of the steamboat striking the wharf with such force as to break it and not the injury to Tolson.

In the case of Gleeson *vs.* Virginia Midland R. R. Co., 140 U. S. 435, the accident happened because of a landslide in a railroad cut caused by an extraordinary fall of rain. It was admitted that the accident happened because of the obstruction of the track by this landslide. The defense was that the landslide was "an act of God," which the court overruled and held that the fact of the obstruction of the track was prima facie evidence of negligence.

In the case at bar the defense does not admit that the car started and thereby threw the plaintiff to the ground. If it made such admission and attempted to show that the starting was not through its negligence then the rule would apply. But the defense is that the car did not start or jerk, but that the plaintiff alighted from the car while it was in

motion and was thereby injured; and that taking all the evidence together, that of the plaintiff as well as that of the defendant, there is not sufficient to support a finding by the jury that the car did start or jerk. Had the case been one that was proper to submit to the jury an instruction to them that if they found from the evidence that the car did start or jerk while the plaintiff was alighting and that she was thereby injured, it would raise a presumption of negligence against the defendant, would have been proper. But that is not the application of the rule that was made by the court below. On the contrary, it held and gave as a reason why the case was properly submitted to the jury, that the plaintiff being a passenger the mere injury to her raised a presumption against the defendant that the accident and injury was caused by its negligence. And it is this application of the rule of which we complain and respectfully say that so far as counsel for the plaintiff in error have been able to find, there is no case that justifies it.

The court below in two prior cases held and applied the rule as we now contend.

In the case of Weaver *vs.* B. & O. R. R. Co., 3 App. Cas. D. C. 436, a mail clerk was killed on a moving train by striking his head against a bridge post near the station where the bag was caught, the post being but 9 inches from the passing car, and the court below said:

> "Whilst the plaintiff's intestate is to be considered as a passenger, it can not be presumed, from the mere fact of his having been killed while *en route*, that the injury was caused by the negligence of the defendant. That he was found dead in the car, killed by coming in contact with the bridge post, does not of itself shift the burden of proof to the defendant. The burden is always upon the plaintiff to make out his case. Where negligence furnishes the cause of action it must be proved by the party alleging it. There are some cases in which it has been said that the law presumes negligence on the part of the carrier from the mere happening of an accident to a

> passenger. This is not a strictly accurate statement of the law. The most that can properly be said is that when an injury occurs through some accident to the means of transportation, which is under the management of the carrier's employees and which, if they exercise proper care, can not ordinarily happen, it affords reasonable evidence, in the absence of explanation, from which negligence may be inferred."

In the subsequent case of Harbison *vs.* R. R. Co., 9 App. D. C. 67, where a passenger who was passing from one end of the car to the other on the running board on the side next the reverse track, and was struck by a car passing in the opposite direction, the court below said:

> "The appellant contends that, to the facts as stated, the maxim *res ipsa loquitur* applies; that, being a passenger upon the car, a presumption of negligence arises from the happening of the accident, which the defendant is called on to rebut,"

and the appellant's contention was negatived by a quotation by the court of what it had said in the preceding case. The two last-named decisions seem to be in harmony with the rule. If the facts in those cases had been proper for the application of the rule, both should have been submitted to the jury, a proposition which that court denied. The court was correct in refusing to apply the rule in those two cases, and it therefore follows that it erred in applying it to the case under consideration.

The following cases in some of the State courts illustrate the application of the rule and demonstrate that the ruling of the court below was error.

In the case of Whalen *vs.* Consolidated Traction Co., 61 N. J. Law 609, the rule is stated thus:

> "The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which

might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised.

"Thus, in Christie *vs.* Griggs, 2 Campb. 79, the plaintiff, a passenger in a stage coach, proved that the axletree broke, and Chief Justice Mansfield, deeming such proof prima facie evidence of negligence, called upon the defendant to show that the damage arose from mere accident.

"In Carpue *vs.* London Railway Co., 5 Q. B. 747, where the train had left the track, Chief Justice Denman instructed the jury that the exclusive management of the machinery and railway being in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give."

In Feital v. Middlesex R. R. Co., 109 Mass. 405, where the evidence of the plaintiff showed injury by the car running off the track, and the question was whether the jury might find negligence from those facts, the court said:

"The burden is on the plaintiff to prove the defendant's negligence. But there are cases where proof of the occurrence of the accident, and of the exercise of due care on the part of the plaintiff, is prima facie proof of the defendant's negligence. A railroad and its cars are constructed and adjusted to each other with the purpose that, when there is no defect in either, the cars shall remain on the track. The fact that a car runs off is evidence of defect or negligence somewhere; and where the track and the cars are under the exclusive control of the defendants, it has been held evidence of negligence sufficient to charge them, in the absence of any explanation showing that the accident happened without fault on their part. Le Barron *vs.* East Boston Ferry Co., 11 Allen, 312; Carpue *vs.* London & Brighton Railway Co., 5 Q. B. 747. It is not incumbent on the plaintiff, after proving an accident which implies

negligence, to go further and show what the particular negligence was, when from the circumstances it is not in his power to do so."

In the case of the Chicago City Ry. Co. *vs.* Rood, 163 Ills. 477, where a passenger was injured by a wagon passing the car on which he was riding, and the trial court instructed the jury that they might presume negligence therefrom, and that the burden was on the defendant to rebut such presumption, the Supreme Court of that State, reversing a judgment in favor of plaintiff, examined the doctrine critically, and in course of the opinion said:

> "The weight of authority seems to be in favor of the position that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier . . . Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper, or unskillful, or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. . . . The presumption in question comes from the nature of the accident and the circumstances surrounding it, rather than from the mere fact of the accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances surrounding the accident are such as to indicate that it would not probably have occurred if the company had been in the use of suitable machinery or safe apparatus, or if it had employed proper and competent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stage-coach, or of the derailment of a car, or of the sudden jerk of a train, or of a blow from part of a passing train, or of a

> collision between two trains belonging to the same carrier, or of the breaking down of a bridge upon the line of a railway."

The authorities concur in holding that this rule is not applicable alone to cases where the relation of passenger and carrier exists between the plaintiff and the defendant, but applies in all cases where an injury occurs as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, or where the accident or occurrence would not have happened if the person having control of the agency causing it had acted with due care.

N. C. Street Ry. Co. *vs.* Cotton, 140 Ills. 494–5.

In Thomas *vs.* Philadelphia and Reading Railroad Company, 148 Pa. St. 183, where the accident occurred to a passenger seated at an open window who was struck by a missile causing the injury, and where there was no evidence as to how the missile came to be thrown, Mr. Chief Justice Paxson said:

> "The rule appears to be that where a passenger is injured, either by anything done or omitted by the carrier or its employees, or anything connected with the appliances of transportation, the burden of proof is upon the carrier to show that such injury was in no way the result of its negligence. But to throw this burden upon the carrier it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation,"

and it was held that no presumption of negligence arose from the happening of the accident in that case.

In the later case of Fleming *vs.* P. C. C. & St. L. R. R. Co., 158 Pa. St. 130, where a stone fell from a point without the right of way of the defendant, striking and killing a passenger, the same rule was announced and followed.

In the case of Benedick *vs.* Potts, 88 Md. 52, the facts were that the plaintiff was riding in an open car on defendant's circular inclined switch-back railway, at a pleasure resort, and fell from the car while it was passing through a tunnel. The car was not derailed and other persons in it were not injured, and there was no defect in the construction of the tunnel or of the car. No evidence was offered to show how or why plaintiff fell on the track, where he was afterwards found unconscious. In holding that no presumption of negligence arose from such facts, it was said by the court:

> "It is a perfectly well-settled principle that to entitle a plaintiff to recover in an action of this kind he must show not only that he has sustained an injury, but that the defendant has been guilty of some negligence which produced that particular injury. The negligence alleged and the injury sued for must bear the relation of cause and effect. The concurrence of both and the nexus between them must exist to constitute a cause of action. As an injury may occur from causes other than the negligence of the party sued, it is obvious that before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evidence legally tending to show, that he is responsible for it; that is, that he has been guilty of the negligence that produced or occasioned the injury. *In no instance can the bare fact that an injury has happened of itself and divorced from all the surrounding circumstances justify the inference that the injury was caused by negligence.* (Italics are ours.) It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. This principle is never departed from, and in the very nature of things it never can be dis-

regarded. There are instances in which the circumstances surrounding an occurrence and giving a character to it are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are instances where the doctrine of res ipsa loquitur is applied. This phrase, which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz, 'first, when the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property and is so tortious in its quality as in the first instance at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency.' Thompson on Neg. 574. But it is obvious that in both instances more than the mere isolated, single, segregated fact that an injury has happened must be known. The injury, without more, does not necessarily speak or indicate the cause of that injury—it is colorless; but the act that produced the injury being made apparent may, in the instances indicated, furnish the ground for presumption that negligence set that act in motion. The maxim does not go to the extent of implying that you may from the mere fact of an injury infer what physical act produced that injury; but it means that when the physical act has been shown or is apparent and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly can not be predicated of any act until you know what the act is. Until you know

> what did occasion an injury, you can not say that the defendant was guilty of some negligence that produced that injury. There is, therefore, a difference between inferring as a conclusion of fact what it was that did the injury, and inferring from a known or proven act occasioning the injury that there was negligence in the act that did produce the injury. To the first category the maxim res ipsa loquitur has no application; it is confined, when applicable at all, solely to the second. *In no case where the thing which occasioned the injury is unknown has it ever been held that the maxim applies, because when the thing which produced the injury is unknown it can not be said to speak or to indicate the existence of causative negligence.*" (Italics are ours). "In all the cases, whether the relation of carrier and passenger existed or not, the injury alone furnished no evidence of negligence—something more was required to be shown."

In Paynter *vs.* B. & M. Traction Co., 67 N. J. 619, the evidence showed that the plaintiff was injured by falling to the ground while in the act of alighting from the defendant's car. The testimony of the plaintiff and two other witnesses had some slight tendency to prove that the fall was caused by the starting or jerking of the car while she was getting off. The trial court overruled a motion to nonsuit the plaintiff on the evidence offered in her behalf, and there was a verdict and judgment in her favor. Upon an appeal by the defendant it was argued in favor of the plaintiff that the judgment should be sustained on the rule of *res ipsa loquitur*, even though the evidence in behalf of plaintiff might be insufficient to establish the fact that the car started while she was in the act of alighting. But the court refused to apply the rule to that state of facts, saying:

> "A fall while alighting from a street car is not such a fact, standing alone, as to authorize the application of the doctrine of res ipsa loquitur. The thing that happened in no way can be said to prove that the defendant was negligent. The only thing proved was the fall. Nothing was proved causing the

fall, or any circumstances which could be in any way said to show that the defendant was negligent. If it had been proved that a jerk or jolt of the car had produced the fall, that fact, unexplained, might be said to prove the defendant's negligence, although the defendant might furnish an explanation of it which would relieve from responsibility. These principles are very fully discussed in the case of Benedick *vs.* Potts, supra, by Chief Justice McSherry, of the Maryland Court of Appeals.

"The application for a non-suit at the close of the plaintiff's case should have been granted."

The court erred in refusing to give the two instructions as prayed by the defendant.

The object and scope of those instructions were to confine the jury in their consideration of the case to the question of whether the accident was occasioned by the negligence of the motorman. The plaintiff herself expressly testified that there was no fault on the part of the conductor, and if the case was to be submitted to the jury at all the defendant was entitled to have the attention of the jury directed to the particular act of negligence specified by the plaintiff, that counsel might argue to the jury that upon the whole evidence they would not be justified in finding that the motorman stopped the car without turning off the current and without fixing the dog in the brake, which is the only theory upon which negligence could be found in the case. But the court refused these instructions and left the case open for the jury to speculate upon the question of whether either the conductor or motorman might not have been guilty of some act of negligence of which there was no evidence whatever. The authorities hereinbefore referred to show conclusively that if it was proper to submit the case to the jury at all, the court erred in not giving instructions asked for.

J. J. DARLINGTON,
C. C. COLE,
R. B. BEHREND,
Attorneys for Plaintiff in Error.

19801

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 214.

CITY AND SUBURBAN RAILWAY OF WASHINGTON,

Plaintiff in Error,

vs.

HEDWIG E. SVEDBORG.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This case comes from the Court of Appeals of the District of Columbia, on a writ of error to a judgment affirming one of the Supreme Court of the District of Columbia in a cause for personal injuries in which the defendant in error was the plaintiff and the plaintiff in error was the defendant.

The defendant in error, a widow, fifty years of age, had been to her former home in Virginia; on her return she was met at the station by her daughter, Olga, and, after making some purchases on Seventh street, they boarded a car of the plaintiff in error, at Seventh and G streets northwest, in the City of Washington, and rode eastward on it to Eleventh and C streets, northeast, the point nearest their home. The defendant brought with her a basket containing eggs and other

articles from the country and this was handed by the defendant in error to the motorman on the front of the car, when she boarded the same at Seventh street. It was a combination car, the rear-half open and the front-half closed. The open portion had an aisle running through the center and the defendant in error took a place on the front seat of the open portion, at the left of the aisle, while her daughter seated herself in the closed portion of the car. The car stopped on C street at the west side of Eleventh street, northeast, the destination of the defendant in error, and her daughter came out of the closed portion of the car, alighted, and went forward to get the basket from the motorman. He reached for it and was about to give the basket to the daughter of the defendant in error, letting go the brake handle for that purpose and reaching the basket over the platform gate, when the car gave a sudden jerk or lurch.

The defendant in error had followed her daughter from the car and at the time of the lurch or jerk was on the running board at the side of the car, which formed a step to be used by the passengers for descending from the car. She was thrown by the lurch or jerk upon her knees on the ground and the fall resulted in a fracture of her hip in the neck of the femur.

She was carried to her home on Eleventh street and laid upon the bed, without being undressed. That same evening she was visited by the claim agent of the plaintiff in error, Mr. Hoover, who did not, however, see her at this time. Later her family physician, Dr. Keetch, visited her and administered a hypodermic injection of morphine to relieve her pain. Early in the morning following Mr. Hoover called again, this time accompanied by Dr. Stone, the physician to the plaintiff in error. They remained in the house for about half an hour, during which time the only member of the

family present was another daughter of the defendant in error, Lulu. While Dr. Stone engaged Miss Lulu in conversation in the front parlor, Mr. Hoover conversed with the defendant in error, who was still in the adjoining room, not yet undressed, and lying partly on the bed and partly on some adjacent chairs. Hoover's questions and the answers of the defendant in error were taken down in shorthand by the former and subsequently written out by him on the typewriter. While alone with the defendant in error he prepared a statement, on one of the printed blank forms of the company, which the defendant in error signed, being assured by Mr. Hoover that otherwise the motorman and conductor would be put off of the car. The defendant in error did not read the statement, but it was read to her by Hoover. As Hoover and Stone were leaving the house they met Dr. Keetch coming in and Stone returned with him, with the intention of making an examination of the injury to the defendant in error. They found, however, that she suffered so much from any movement of the limb that it was not deemed advisable to make this examination without the use of an anesthetic, and it was therefore postponed until the next day.

She kept her bed for twelve weeks and her room for six months, and at the time of the trial, nearly two years later, had to use a crutch. Her left leg was shortened about two inches by the injury.

The amended declaration alleged, among other things, that because of the defendant's (plaintiff's in error) negligence, the plaintiff (defendant in error) "was greatly bruised and permanently injured about the left hip, and the said hip was permanently fractured and her left leg was permanently shortened, and she became lame and unable to walk without the aid of a crutch." On the plea of "not guilty," issue was joined, and the case went to trial and resulted in a verdict for

the plaintiff (defendant in error) for $6,500, upon which judgment was entered. From that judgment an appeal was taken to the Court of Appeals of the District of Columbia, which affirmed the judgment of the court below; whereupon this writ of error was sued out.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

First. That the court below erred in affirming the ruling of the trial court in refusing to instruct the jury to return a verdict for the plaintiff in error.

Second. That the court below erred in applying the rules res ipsa loquitur to the case in determing the point mentioned in the first assignment of error.

We prefer to discuss both of these assignments together.

The testimony of the defendant in error is clearly stated in the opinion of the Court below in the following words:

> "That she is a widow, fifty years old, living on Eleventh street, northeast; that on the evening of the accident she was on her way home from her country place in Virginia, and that her daughter, then fourteen years of age met her at the depot; that she had brought with her from the country a basket containing eggs and other articles; that she and her daughter boarded the defendant's car at Seventh and G streets going east; that the car, which was a combination car, the closed part being in front and the closed part in the rear, was crowded; that she took a seat in the open car and her daughter in the closed part; that before boarding the car she handed to the motorman thereof her basket; that when the car neared her destination, Eleventh and C streets, northeast, there was only one other passenger, a gentleman, in the car besides herself and daughter; that the car stopped at Eleventh and C streets—on the west side thereof—and her daughter alighted; that

while her daughter was walking up towards the front of the car to procure the basket from the motorman, she attempted to alight, when the car jerked forward and threw her to the ground; that she got up and fell again; * * *

"On cross-examination she stated that the car was standing when she arose from her seat to get off; that she kept her seat when the car stopped, and got up as soon as it stopped; that she stepped on the running board and looked towards the motorman to see if he handed the basket to her daughter; that as soon as her daughter reached to get the basket the car gave a jerk and she was thrown to her knees; that she is not positive whether the car started or gave a jerk; that she was on the running board a second when the car started or jerked; that her daughter got off the car at the side before witness, and had gotten up to the motorman before the car started; that she saw the motorman pick up the basket and hand it to her daughter, when she was thrown." (Record, p. 29; testimony pp. 4-6.)

Her daughter testified as follows (p. 7):

"Q. What caused her to be thrown beside the car?

"A. When the motorman handed the basket over with both hands it caused a jerk.

"Q. A jerk of what, Miss Olga?

"A. A jerk of the car."

And this witness said over and over again, on cross-examination, that the car jerked when the motorman let go the brake lever to hand her the basket.

This evidence established, *prima facie*, the following facts: That there was an accident through which the defendant in error, a passenger on the car of the plaintiff in error, was injured; *that the accident was caused by the sudden move-*

ment of the car, an instrument entirely under the management of the agents of the plaintiff in error.

Here, we submit, was the *prima facie* case required by the doctrine *res ipsa loquitur.*

> "There is a class of cases in which there has been no direct evidence of any particular act of negligence, beyond the mere fact that something unusual has happened, which has caused the injury, and upon the maxim, or rather phrase *'res ipsa loquitur,'* it has been held that there has been negligence."
>
> Whittaker's Smith on Negligence, 522.

In the case of Consolidated Traction Co. *vs.* Thalheimer, 59 N. J. L., 474, the plaintiff was injured by being thrown from the car by a sudden lurch as she was about to alight. The Court said:

> "As street cars run upon rails fixed and leveled in the highway, and not permitting lateral motion, and are provided with brakes which, when applied quickly or when, after being applied, are released quickly before the momentum of the car has been overcome, produce known mechanical effects upon persons on the car, the occurrence of a lurch or jerk of the violence described, fairly justifies an inference that either the tracks were improperly laid or the brakes were improperly handled. At all events, the fact that such a lurch or jerk would have been unlikely to occur if proper care had been exercised, brings the case within the maxim of *'res ipsa loquitur,'* as expounded in the Court of Errors in Bahr *vs.* Lombard, Ayres & Co., 53 N. J. L., 233."

In the case of *Bahr* vs. *Lombard, supra,* the Court defines *res ipsa loquitur* as "something in the facts that speaks of the negligence of the defendant."

In *Dougherty* vs. *The Missouri R. R. Co.*, 81 Mo., 325, the plaintiff got on defendant's horse car, and before he could take his seat, the car started forward with a violent jerk, upsetting and injuring him. There was no direct proof that the sudden movement was caused by any act of the driver or team. The Court stated the rule as follows:

> "When the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as, under the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care."

This doctrine was approved in *Murphy* vs. *St. L. I. M. & S. Ry. Co.*, 43 Mo. App., 343.

In *Murphy* vs. *C. I. & B. R. R. Co.*, 36 Hun, 199, the plaintiff and her young daughter testified that the car gave two jolts and seemed to be lifted off the track and plaintiff was thrown forward and injured. The Court said:

> "The happening of an accident which, in the usual and ordinary course of things, would not happen with proper care, casts the burden upon the defendant of explaining the accident so as to relieve itself from liability. Under the proof the plaintiff can ask an inference of negligence. There was no explanation consistent with it. Proof was given tending to show that it was not true, and that the injury did not result in the manner claimed, but as these questions are questions of fact, the verdict of the jury settles them in favor of the plaintiff. The proof of the injury was ample, if credited, to sustain the verdict.
>
> Approved in Webster *vs.* E. C. & N. R. R. Co., 85 Hun, 170.

"It is urged upon the part of the appellant that the only person who testified that the car moved or jerked says she did not see what started it. The car having stopped and the passengers having been called upon to alight, if, in the act of alighting, the plaintiff was thrown from the car, it was necessary for the appellant to prove that it was not responsible for the happening of that movement, in order to absolve itself from liability. It was not incumbent upon the plaintiff to say what caused the jerk. It was negligence upon the part of the appellent to allow the car to move while the passengers were in the act of alighting."

Martin *vs.* Second Ave. R. R. Co., 3 App. Div. (N. Y. S. C.), 348-350.

In the very recent case of *Palmer et ux.* vs. *Warren Street Railway Co.* (—— Pa. St. ——! 56 Atl. 49), the brake chain of a car broke and a collision was threatened with the car in which the plaintiff was a passenger, and she, in fear of such collision, jumped and was injured. The Supreme Court of Pennsylvania said:

"The collision itself, without more, would have been evidence that someone in the employ of the company had blundered, or neglected his duty. As a matter of fact, the collision was due to the breaking of a brake chain; but the case was within the *unbending rule,* applicable to railroad and street passenger railway companies alike, that, *where a passenger on a car is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of rebutting it.* Laing v. Colder, 8 Pa. 479; Sullivan v. Philadelphia & Reading Railroad Co., 30 Pa. 234; Meier vs. Pennsylvania Railroad Co., 64 Pa. 225; Philadelphia & Reading Railroad Co. v. Anderson, 94 Pa. 351; Clow v. Pittsburg Traction Co., 158 Pa. 410; Dixey v. Philadelphia Traction Co., 180 Pa. 401; Kepner v. Harrisburg Traction

Co., 183 Pa. 24. And it is immaterial that the collision was not due to any defect in the car on which the plaintiff was riding, or the machinery connected with it, but a broken appliance on a car which ran into it; for the presumption of the defendant's negligence arises not only when the injury is caused by a defect in the road, cars, or machinery, or by want of care or negligence in those employed, but by any other thing which the company can or ought to control as a part of its duty to carry the passengers safely. Meier v. Pennsylvania R. R. Co., supra The other thing here which was under the control of the company was the chain that broke on another car which ran into the one on which the plaintiff had been a passenger."

In the case of *Gleeson* vs. *Virginia Midland R. R. Co.*, 140 U. S. 435-443, this Court said:

"Since the decisions in *Stokes* vs. *Saltonstall*, 13 Pet., 181, and *Railroad Co.* vs. *Pollard*, 22 Wall., 341, it has been settled law in this Court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co.* vs. *Tolson*, 139 U. S., 551."

* * * * * * * * *

"The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was, in fact, the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence

> of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the Court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances" (p. —.)

We submit, therefore, that, at the close of the defendant in error's case, a state of proof existed which called upon the plaintiff in error to make an explanation which should rebut the presumption of negligence thus raised by the evidence for the defendant in error.

Plaintiff in error lays especial stress on the fact that the witness Olga Svedborg varied in her testimony. On the one salient fact that the car gave a jerk and that that jerk threw her mother, the defendant in error, to the ground, she never varied. All other matters testified to by her were colateral to the main one, as stated above.

The two cases from the District Court of Appeals cited in the brief of the plaintiff in error (Weaver vs. R. R., 3 App. Cas. D. C., 436, and Harbison vs. R. R., 9 App. Cas. D. C., 67) differ materially from the one at bar. In neither of those cases was there the slightest evidence of any unusual occurrence contributing to the accident. In the Weaver case (pp. 454-5) the court said:

> Had there been actual proof that the bag was wedged in the catcher so as to require extraordinary exertion to remove it, thereby probably necessitating the exposure of the head of the intestate, which, contributed to by the "lurch of the car," or the not unreasonable "slipping of the feet or hands," may have caused his death, the question of negligence should have been submitted to the

jury. It would have been error to take it away from them.

In the case at bar there was clear testimony tending to prove that there was an unusual occurrence, a jerk or lurch of the car, at a time when it should have been in absolute rest for a passenger to alight.

This explanation from the plaintiff in error being thus called for by the rule, "it was for the jury to say, under all the evidence, whether the explanation, on the part of the defendants, was reasonably made."

Mullen *vs.* St. John, 57 N. Y., 567.

But the plaintiff in error attempted no explanation. As in the Murphy case, in 36 Hun, cited *supra,* it denied the truth of the evidence of the defendant in error of any jerk at all.

The plaintiff in error offered four witnesses to the occurrence, the motorman, Hunt (p. 21); the conductor, Walters (pp. 20-21); the former employee and present passenger, Meade (pp. 22-24); and the motorman of the following car, Mathiot (p. 24). All denied the occurrence—the jerk of the car; no explanation was attempted. Here was a clear, sharp issue of fact, and the defendant in error was entitled to have it go to the jury. Other witnesses, for the plaintiff in error were several expert gentlemen (pp. 24-25) called to prove that the accident could not, in any event, have happened in the manner claimed by the defendant in error; giving the evidence, in fact, required by the rule *"res ipsa loquitur,"* that the accident would not have occurred in the usual and ordinary course of events, with proper management.

The evidence of the plaintiff in error, as to the occurrence, was, therefore, that of employees, except that of

Meade, a former employee, whose theories as to the rights of the public were evidenced to the jury by his statement that he had been a motorman, but had been discharged for an accident which "occurred because a colored woman got too tired to get out of his way, and he hit her with the fender of the car" (p. 23). The employee, Mathiot, was on his car one-half square from the scene of the accident (p. 24.)

With this testimony before it the Court was asked to instruct the jury for the plaintiff in error upon all the evidence, and to the Court's refusal so to do, the plaintiff in error excepted. We submit that the Court did not err.

In the case of *Elwood* vs. *W. U. Tel. Co.*, 45 N. Y. 549-554, there was a controversy about the sending of a message and the defendant's operators were witnesses on its behalf. The Court said:

> "From the necessity of the case, such evidence as there is to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the submission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject-matter in controversy was of itself sufficient to take from the Court the right to dispose of the case upon their evidence and to require that the jury should pass upon the weight to be given to them."

In *Volkmar* vs. *Manhattan Ry. Co.*, 134 N. Y., 418, a plate fell from the elevated railroad and injured the plaintiff. The defendant offered as a witness a track-walker, whose duty it was to inspect and repair the structure; he tes-

tified to a recent inspection and performance of his duty. The Court held that "the fall of the plate or clip, in the absence of explanation, raises a presumption of negligence." The *nisi prius* court had directed a verdict for the defendant. The Court of Appeals said:

> "Even if this evidence was sufficient to remove the presumption, as held by the general term, the credibility of the witness would still be involved, and be a question for the jury. The witness was the defendant's track-walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was, therefore, a person interested and possibly actuated by a motive to shield himself from blame."

Upon broad grounds the plaintiff was entitled to have a verdict of the jury on the evidence, on the *res ipsa loquitur* doctrine. A presumption of fact was raised by the testimony, and dealing with such presumptions is exclusively the province of the jury. Touching this point Mr. Justice Holmes (now a member of this court) says, in *Graham* vs. *Badger,* 164 Mass., 42-47.

> "*Res ipsa loquitur*—which is merely a short way of saying that, so far as the Court can see, the jury from their experience as men of the world may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort,

usually are for the jury. The Court ordinarily confines itself to considering whether it can say that there is no such presumption, or in other words, that such accidents commonly are not due to negligence."

Doyle *vs.* B. & A. R. R. Co., 145 Mass., 386-387-388.
Howser *vs.* Cumberland & Penn. R. R., 80 Md., 146.

Aside from the presumption of fact which, as we have submitted, arose from the evidence of the defendant in error, there was a clear issue as to the occurrence upon which that presumption was based, that is the sudden starting of the car.

The rule of this court as to the submission of matters of negligence to the jury is well stated in the following cases:

"The question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion; or in other words, a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish."

Gardiner *vs.* R. R. Co., 150 U. S., 349-361.

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the question is matter for the jury. It is only where the facts are such that reasonable men *must draw the same conclusions from them,* that the question of negligence is ever considered as one of law for the court."

Texas & P. Ry. Co. *vs.* Gentry, 163 U. S., 353-368.

Applying this principle of law to the case at bar the court below could not, with propriety, have instructed the jury for the plaintiff in error upon all the evidence, and there was no error in refusing so to do.

THIRD ASSIGNMENT OF ERROR.

That the trial court erred in refusing to grant two prayers of the defendant (plaintiff in error).

This assignment is directed to the modification of a prayer of the plaintiff in error which appears on pages 25 and 26 of the record, and to its refusal to grant another, also appearing on page 26. The first was granted in the following language, the italicized words "*or conductor or both,*" being inserted by the court over the objection of plaintiff in error.

> "In order to entitle plaintiff to a verdict, the burden is upon her to prove by a preponderance of the evidence, to the satisfaction of the jury, that the car stopped for her to alight, and that while she was in the act of alighting, the car, through the negligence of the motorman *or conductor or both,* started and thereby threw her to the pavement and injured her, and unless, upon the whole evidence, the jury shall so find, the verdict should be for the defendant."

The gist of the contention of plaintiff in error is that the defendant in error must prove the accident to have been caused by the negligence of the motorman as the defendant in error had exonerated the conductor.

It is a question whether the whole prayer was not open to objection by the defendant in error. Her amended declaration laid the negligence upon the plaintiff in error, not charging it specifically as that of one or more of its agents or servants. The starting of the car, under the declaration, might have been due to the negligence of either the motorman or conductor, or to other agencies whereby the apparatus itself was at fault. The specific cause of the movement which led to the accident, as we have contended, and shown by overwhelming authority, it is not the duty of the defendant in

error to charge or prove; and no attempt was made to do either.

The cause before the jury was made up by the pleadings, and the defendant in error was entitled to the full scope of the issue as thereby made. The declarations of the defendant in error may well have been considered by the jury, but it would have been improper for the court to have limited the issue as those declarations might affect it.

> "An admission by a party that he alone is to blame for an injury sustained by him is an admission of a mixed conclusion of law and fact, and though proper to go to the jury does not conclude the party making it."
>
> Daub *vs.* N. P. R. R. Co., 18 Fed., 625.

> "The statements of one injured by the alleged negligence of a railroad company, made after the accident, are not conclusive respecting the manner in which the accident occurred, and the absence of wilful intention to injure him, but may be considered in connection with other circumstances."
>
> Cooper *vs.* Railroad, 44 Iowa, 134-137.

The same argument applies to the other prayer which the court declined to give *in toto*.

A. A. LIPSCOMB,
CHAS. P. JANNEY,
PHILIP WALKER,
Attorneys for Defendant in Error.

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Supreme Court of the United States.

No. 214.—October Term, 1903.

City and Suburban Railway of Washington, Plaintiff in Error, *vs.* Hedwig E. Svedborg. } In error to the Court of Appeals of the District of Columbia.

[May 2d 1904.]

Mr. Justice Harlan delivered the opinion of the Court.

The plaintiff in error is a corporation organized under acts of Congress and engaged in the business of carrying passengers for hire in street cars operated on public highways in the District of Columbia.

The defendant in error was received as a passenger on one of such cars, and, in alighting from the one in which she was riding, was thrown to the ground and seriously injured.

The present action was brought against the railway company to recover damages on account of such injuries, the theory of the plaintiff's case being that the car in which she was a passenger was stopped for her to alight from it, and while she was stepping off it was suddenly and recklessly started, whereby, without negligence on her part, she was violently thrown to the ground.

The railway company pleaded not guilty as alleged, and the plaintiff joined issue on that plea.

The case was then tried before the court and a jury, the plaintiff introducing evidence tending to sustain her theory as to the cause of the injuries received by her, while the defendant introduced evidence tending to sustain its theory, which was that the plaintiff negligently attempted to alight from the car before it had actually stopped.

At the conclusion of the plaintiff's evidence the defendant asked the court to instruct the jury to find in its favor, upon the ground that the evidence was insufficient to justify a verdict for the plaintiff. That motion was denied, and the defendant excepted. The defendant then introduced evidence, at the close of which the motion to direct a verdict in its favor was renewed. The motion was also denied, and the defendant excepted.

It appears from the record that the court then granted two instructions at the request of the plaintiff and six instructions asked by the defendant. But none of the instructions so given, on either side, were embodied in the bill of exceptions. What they were this court has no means of knowing.

There was a verdict and judgment in favor of the plaintiff for $6,500, and that judgment was affirmed in the Court of Appeals for the District.

The railway company assigns for error the refusal of the trial court to direct the jury to find a verdict in its favor. The refusal was proper; for there was evidence of a substantial character bearing upon the general issue as to the negligence of the defendant, and therefore the question was one peculiarly for the jury. Even if the court thought that the preponderance of evidence was for the defendant, it was not bound, simply for that reason, to have taken the case from the jury, whatever influence that fact might have in disposing of a motion for a new trial.

It is also assigned for error that the trial court refused to give the following instruction to the jury:

"In order to entitle the plaintiff to a verdict, the burden is upon her to prove by a preponderance of the evidence, to the satisfaction of the jury, that the car stopped for her to alight, and that while she was in the act of alighting the car, through the negligence of the motorman, started, and thereby threw her to the pavement and injured her, and unless, upon the whole evidence, the jury shall so find, the verdict should be for the defendant."

The court refused to grant that instruction without inserting after the word "motorman" the words "or conductor or both." These words having been inserted, the instruction was granted. The defendant excepted to the refusal of the court to give the instruction as asked.

It is contended that it was error prejudicial to the railway company to have added these words to the instruction asked, because by so doing the jury were, in effect, told that there was sufficient evidence upon which to base an inquiry whether the conductor was guilty of negligence; whereas, the company insists, there was not the slightest proof showing negligence on the part of the conductor.

We need not review the evidence as to the conductor; for if, as the defendant insists, there was no evidence whatever showing negligence upon the part of the conductor, then the modification made by the court could not have so misled the jury as to prejudice the defense.

It is assigned for error that the trial court refused to grant the following instruction asked by the defendant: "The jury are instructed that under the evidence in this case they cannot find any negligence on the part of the conductor of the car, and unless they shall find from the evidence that the motorman was guilty of negligence which caused the accident to plaintiff, they should find for the defendant, and in considering that question they cannot infer the existence of any fact not shown to their satisfaction by the evidence."

Testing the action of the trial court alone by the evidence set out in the bill of exceptions, we cannot hold that the instruction in question was im-

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properly denied; for that instruction took it for granted that there was not a scintilla of proof—none whatever—of negligence on the part of the conductor, and that the negligence, if there was any, was wholly or exclusively that of the motorman. The court below was not bound to submit the case to the jury in that way. It was not bound to make a particular part of the evidence the subject of a special instruction. Under the circumstances of this case, it properly submitted to the jury the whole case as to the alleged negligence of the company, leaving them to determine whether, under all the evidence, the injury was caused by the negligence of its employees or any of them. The plaintiff was entitled to a verdict if the injury was caused by the negligence of any employee.

In the argument at the bar much was said by counsel as to the principles of law announced by the Court of Appeals, particularly in respect of the application of the maxim "*Res ipsa loquitur*." Our attention has been called to many authorities upon that branch of the case. But we deem it unnecessary to extend this opinion by a review of those authorities; for, even if the Court of Appeals erred in its application of that maxim—and we express no opinion upon that point—the judgment should not be reversed, since, as we have seen, the record before us does not show that the trial court committed any error to the substantial prejudice of the defendant.

The judgment of the Court of Appeals affirming the judgment of the Supreme Court of the District must, therefore, be affirmed.

It is so ordered.

Mr. Justice WHITE and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.